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No.

In the

Supreme Court of the United States

STERLING CONSULTING CORPORATION,
a Colorado corporation, as receiver for the
Indian Motorcycle Manufacturing Inc.,
a New Mexico corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

The Tenth Circuit Court of Appeals has held that the tax exception of the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and the Anti-Injunction Act, 26 U.S.C. § 7421(a) prohibit the United States District Court for the District of Colorado from ordering the Internal Revenue Service of the United States of America to conclude its audit and make its assessment in the receivership action. This holding raises three substantial federal questions that warrant immediate review by this Court:

1. Whether the determination by the Tenth Circuit of Appeals violates the separation of powers provisions of the United States Constitution, and therefore conflicts with the decisions of this Court in *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-60 (1982), by ceding an inherent power of the District Court to another branch of government?

2. Whether the IRS's voluntary intervention in an *in rem* case subjects the IRS to orders of the District Court entered in the ordinary course of resolving the *in rem* case under well-settled principles of law established by this Court in *The Siren,* 74 U.S. (7 Wall) 152,154 (1868) and *United States v. The Thekla,* 266 U.S. 328, 340-341 (1924)?

3. Whether the facts of this case bring it within either of two judicially-created exceptions to the prohibition on declaratory judgments regarding federal taxes under *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-737 (1974)?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Sterling Consulting Corporation, a Colorado corporation, as receiver in *In Re: Indian Motorcycle Manufacturing, Inc. and Concerning the United States of America,* 95-Z-777 (D-Colo., 1995); and

Internal Revenue Service of the United Stated of America

CORPORATE DISCLOSURE STATEMENT

Petitioner, Sterling Consulting Corporation, is the only party that is a corporation. It is not publicly held and no publicly held company owns any shares of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Sterling Consulting Corporation, (the "receiver") respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. Relying on the "tax exception" of the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (the "Act") and the Anti-Injunction Act, 26 U.S.C. § 7421 (a), the court of appeals decided that the United States District Court for the District of Colorado ("District Court") had no jurisdiction to establish procedures requiring the IRS to address the federal income tax liabilities of the corporation subject to the receivership even though the IRS had intervened in the action. That decision is contrary to well-established principles governing *in rem* actions recognized long ago by this Court. It conflicts with decisions of Courts of Appeal for the Ninth Circuit; *Cororporacion Mexicana de Servicios Maritimos, S. A. di C. V. v. The M/T Respect,* 89 F.3d 650,656 (9th Cir. 1996); *United States v. State of Oregon,* 657 F.2d 1009, 1015-1016 (9th Cir. 1981), as well as the Tenth Circuit decision in *Alvarado v. J.C. Penney Co.,* 997 F.2d 803, 805 (10th Cir. 1997). It should therefore be reversed.

OPINION BELOW

The decision of the court of appeals is reported at 245 F.3d 1161 (10th Cir. 2001).

The orders of the District Court from which the IRS appealed are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2001. The Receiver's Motion for Rehearing by Panel an *En Banc* was denied on August 7, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court in the underlying case had jurisdiction pursuant to 28 U.S.C. § 1332.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

See Appendix

STATEMENT OF THE CASE

A. The Proceeding Below.

In 1995, Eller Industries, Inc. commenced this action to appoint a receiver for Indian Motorcycle Manufacturing, Inc. ("IMMI"). The Colorado District Court had jurisdiction under 28 U.S.C. § 1332(a)(1) and appointed Petitioner receiver (the "receiver") of the corporation and its assets. IMMI was one of six American companies with a colorable claim to the famous Indian Motorcycle trademark (the "Trademark"). In addition to IMMI, the Receiver obtained de facto control over two of the other companies with colorable claims to the Trademark. The three remaining companies with colorable claims to the Trademark were in bankruptcy (the "Bankruptcy Cases"), and were Administratively Consolidated before the United States Bankruptcy Court for the District of Massachusetts (the "Massachusetts Bankruptcy Court"). With the approval of the Colorado District Court and the Massachusetts Bankruptcy Court, the assets of the Receivership Estate and

the Bankruptcy Cases were sold in early 1999 for cash and other consideration as a single lot to a single purchaser.

Two years prior to the sale, the IRS moved to intervene in the Receivership Action pursuant to F.R.C.P. 24, claiming intervention was necessary "to protect its legally recognizable interest in the assets of defendant." The IRS motion and the order allowing intervention had no condition or limit to its status as intervenor on its face. After becoming a party to the Receivership Action, the IRS participated in hearings before both courts concerning the disposition of the sale proceeds and admitted it was subject to the personal jurisdiction of the District Court.

As more fully explained below, the IRS appeal to the Tenth Circuit arose from orders of the District Court granting the receiver's motion to have the District Court approve federal income tax returns for certain tax years of IMMI and a related corporation, Indian Motor Co. ("Motor"). The IRS objected, claiming that the District Court lacked jurisdiction to grant this relief. After notice and hearing, the District Court overruled the IRS's objections; determined it had jurisdiction; directed the IRS to respond to the merits of receiver's motion, but also found the jurisdictional issue was ripe for appeal under 28 U.S.C. § 1292(b) (App 12-19). The court of appeals granted the IRS's petition to take an interlocutory appeal and thereafter reversed the District Court.

B. Statement of Facts

In February 1999, with the approval of the Colorado District Court and the Massachusetts Bankruptcy Courts, the combined assets of the Receivership Estate and Bankruptcy Cases were sold for approximately $18 million and other considerations as a single lot to a single purchaser. An

escrow of $3.5 million was established to pay claims in the Bankruptcy Cases, subject to certain conditions. The tax and related jurisdictional issues arose from the following events in the Colorado District Court and Massachusetts Bankruptcy Court:

In September 1999, the Massachusetts Bankruptcy Court approved a settlement between the Receiver and the trustee in the Bankruptcy Cases (the "Trustee") regarding the allocation of the sale proceeds. As a part of the settlement it was agreed that, in addition to federal tax returns for the Receivership Estate, the Receiver would ask the Colorado District Court approve the federal tax returns of the Bankruptcy Cases on an expedited basis.

On October 29, 1999, the Receiver requested an order from the Colorado District Court determining that no additional taxes were owed by the Bankruptcy Cases ("First Tax Motion"). The IRS objected asserting lack of jurisdiction. Its objection was overruled, first by the Magistrate Judge supervising the Receivership on January 10, 2000 and then by the Colorado District Court on March 16,2000.

Before the Colorado District Court order of March 16, 2000, the following occurred in the Massachusetts Bankruptcy Court:

1. On December 22, 1999, the Trustee moved for Massachusetts Bankruptcy Court approval of his final accounts so he could make distributions to creditors before the end of 1999 and thereby avoid the issue of income taxes derived solely from holding the sale revenues beyond the year end of the Bankruptcy Cases ("Trustee's Account Motion") As a part of that motion, and pursuant to the September 1999 settlement, the Trustee was obligated to distribute $1.2 million to the Receiver to be held in escrow

pending resolution of the tax issues facing the Bankruptcy Cases.

2. The IRS objected to the Trustee's Account Motion at a hearing before the Bankruptcy Court on December 28. Because it claimed the tax liabilities of the Bankruptcy Cases were approximately $1.2 million, the IRS asserted the $437,000 escrow was insufficient.

3. On December 30, the Massachusetts Bankruptcy Court entered findings of fact and conclusions of law approving the Trustee's final accounts, as modified by the agreement of the Trustee and Receiver and, *inter alia,* ordered the Trustee to deliver $1.2 million in escrow to the Receiver. The escrow was to be distributed first to the IRS to pay income taxes of the Bankruptcy Cases, then to bankruptcy creditors until paid in full, and then to the receiver ("Final Accounts Order"). The Final Accounts Order repeated the receiver's agreement "to prosecute the [First Tax Motion] in an expeditious manner and to seek a determination of the non-liabilities of the [Bankruptcy Cases] for any taxes to the IRS."

4. On January 7, 2000, the IRS appealed the Final Accounts Order to the Massachusetts Bankruptcy Appellate Panel for the First Circuit (the "BAP") and later prevailed. In April 2001, the BAP reversed the Final Accounts Order, holding that the Massachusetts Bankruptcy Court could not cede jurisdiction to determine the tax liabilities of the Bankruptcy Cases to the District Court and that the Massachusetts Bankruptcy Court lacked jurisdiction to estimate their tax liabilities before the IRS had made an assessment.

Back in the Colorado District Court, on March 3, 2000, while the IRS appeal was pending, the receiver filed its Second Tax Motion and a supporting affidavit of its

president. That motion sought an order from the Colorado District Court that the federal tax returns of IMMI and Motor for 1993 through 1999 were true and correct and that the receiver owed no taxes other than as stated in the returns. The orders of the Magistrate Judge and later the Senior Judge granting the Second Tax Motion produced the IRS appeal to the Tenth Circuit and ultimately this petition.

The IRS's objection to the Second Tax Motion asserted the District Court lacked subject matter jurisdiction because the IRS had not waived sovereign immunity. Alternatively, if the court had jurisdiction, the IRS sought additional time to respond. On May 10, 2000, the Magistrate Judge overruled the IRS jurisdictional objection and ordered it to respond to the merits by August 31, 2000. If the IRS did not conclude its consideration of the tax returns by that date, the returns would be deemed to have been completed correctly with no further tax liability.

The IRS objected to the Magistrate's ruling to the District Court. The District Court overruled the IRS's objection to the May 2000 order on July 17, 2000. In doing so, the District Court found and concluded:

A. Until the tax liabilities of the Bankruptcy Cases, IMMI, and Motor were determined, it would not be feasible to wind-up the receivership.

B. The Magistrate Judge's May 2000 Order "represents an effort to resolve the question of the tax liabilities so that the receivership can be terminated."

C. "When the United State intervened in this case, it subjected itself to the Court's jurisdiction with regard to the receivership. As IMMI and Motor are property of the Receivership Estate, the Court has jurisdiction to order the

IRS to determine the tax liability of IMMI and Motor within a reasonable deadline."

REASONS FOR GRANTING CERTIORARI

I. THE TENTH CIRCUIT OPINION IS IN CONFLICT WITH THE SEPARATION OF POWERS REQUIREMENTS OF THE UNITED STATES CONSTITUTION. AND IS CONTRARY TO PRIOR OPINION OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

At bottom, this is a separation of powers case. Receiverships are strictly judicial branch events and, as such, receivership actions are not subject to interference from the other two branches. Incursions into the exclusive judicial domain of receivership actions by the executive branch has not been tolerated by this Court previously, and should not be tolerated now.

Only once has Congress altered the District Courts' unfettered control over receiverships and the parties to receiverships by statute, and it did this by expanding the jurisdiction of other courts and allowing them to hear cases against receivers in certain, limited circumstances. 28 U.S.C. § 959 was enacted to resolve a conflict between the jurisdiction of District Courts in receiverships and the Seventh Amendment right to a trial by jury.[1] If Congress

[1]The second sentence of F.R.C.P. 66 (which codified the power of a District Court to appoint a receiver) reads: "The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts." This facially simple sentence is, in fact, quite complicated, and contains law that is not apparent from the face of the section. The annotations that follow Rule 66 state: "The second clause of the sentence merely incorporates the well-known and

were ever to try to narrow receivership court jurisdiction it would violate the doctrine of separation of powers.

The Constitution nowhere contains an express injunction to preserve the boundaries of the three broad powers it grants. This Court has developed two separate doctrines for resolving separation of powers issues commonly referred to as the "formalist" and the "functional" doctrines.

The formalist approach emphasizes the necessity to maintain three distinct branches of government through the drawing of bright lines demarcating the three branches from each other determined by the differences among legislating, executing, and adjudicating.[2] The functional approach emphasizes the core functions of each branch and asks whether the challenged action threatens the essential

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general rule that, absent statutory authorization, a federal receiver cannot be sued without leave of the court which appointed him, applied in the federal courts since *Barton v. Barbour* (1881) 104 U.S. 126. *See also* 1 Clark on Receivers (2d ed.) Sec. 549."

The rule in the *Barton* case referred to in the annotation is the broad rule that receivers may only be sued in the court that appointed them. The rule in *Barton* was iron-clad, even to the point that it defeated the right of a plaintiff injured by a receiver to have the claim heard by a jury or heard in the district where the tort occurred. In enacting 28 U.S.C. § 959, Congress provided a means for a very limited universe of plaintiffs to sue receivers in foreign jurisdictions (*i.e.*, outside the jurisdiction of the appointing court), and without leave of the appointing court.

[2]The pressure inherent within each of the separate branches to exceed the outer limits of its power . . . must be resisted. Although not expressly sealed from one another, the powers delegated to the three Branches are functionally identifiable. *INS v. Chadha*, 462 U.S. 919, 951 (1983); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64-66 (1982) (plurality opinion); *Bowsher v. Synar*, 478 U.S. 714, 721 -727 (1986).

attributes of the legislative, executive, or judicial function or functions.[3]

The Tenth Circuit Opinion runs afoul of the separation of powers requirements of the Constitution regardless of which doctrine is utilized. The Court has already held that the power of the District Court to appoint a receiver and to administer the receivership estate is an inherent power of the District Court. *See* discussion in Section II, below. The Tenth Circuit Opinion ignores this and assumes Congress, without any thought or legislative history, intended to and succeeded in altering this Court's rulings that a District Court supervising a receivership has inherent authority to issue any order needed to collect, preserve, or distribute assets of the receivership.

As correctly pointed out by the Tenth Circuit Court's Opinion, the Declaratory Judgments Act, 28 U.S.C. § 2201(a), and the Anti-Injunction Act, 26 U.S.C. § 7421, (collectively, the "Tax Limitation Acts") both operate to draw a bright line of demarcation between the judicial branch and the executive branch by imposing a limit on the District Court. The Tax Limitation Acts prohibit the District Court from an incursion into the business of the IRS (*i.e.*, prohibit the District Court from declaring taxes before the IRS has completed its work and assessed a tax). They maintain the functional integrity of each branch. This would be the end of the story, and the Tenth Circuit Opinion would be correct, except for the intervention in an *in rem* case by the IRS.

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[3] *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 850-51, 856-57 (1986); *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 587 , 589-93 (1985). The Court had first formulated this analysis in cases challenging alleged infringements on presidential powers, *United States v. Nixon*, 418 U.S. 683, 713 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425, 442 -43 (1977), but it had subsequently turned to the more strict test. *Schor* and *Thomas* both involved provisions challenged as infringing judicial powers.

At its sole election, however, the IRS may abandon the insulation provided by the Tax Limitation Acts and submit itself and its issues to the District Court for determination. This may be done directly (*e.g.*, asking the District Court for relief) or indirectly (*e.g.*, by assessing a tax in a pending bankruptcy case or receivership case). In this case, it elected the former by intervening in an *in rem* case. By intervening in an *in rem* case, the IRS intervened for all purposes related to the *res* and waived sovereign immunity for all purposes related to the *res*.[4] To allow the contrary is

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[4]The receiver recognizes that in an *in personam* case the IRS can intervene for a limited purpose. In an *in rem* case, however, intervention by a sovereign is waiver of sovereign immunity for any purpose related to the res. *United States v. The Thekla*, 266 U.S. 328, 339-340 (1924) ("When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with respect to the subject matter."); *The Siren*, 74 U.S. (7 Wall) 152,154 (1868) ("[W]hen [the United States] proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and affirmative relief against them, beyond the demand or property in question."). *See also Cororporacion Mexicana de Servicios Maritimos, S. A. de C. V. v. The M/T Respect*, 89 F.3d 650,656 (9th Cir. 1996) (by intervening in an *in rem* action agency of the Mexican Government waived sovereign immunity for all issues related to the *res*).

It is important to note the IRS's intervention waives sovereign immunity to the *res* of the case in which it intervened. The most recent Court of Appeal explications of *The Siren* are found in *Miller v. Tony and Susan Alamo Foundation*, 134 F.3d 910, 916 (8th Cir. 1998) (*Miller II*), which succeeded *Miller v. Tony and Susan Alamo Foundation*, 975 F.2d 547 (8th Cir. 1992) (*Miller I*). In *Miller I*, the Millers had seized certain property and had it sold at auction to satisfy a judgment against the Foundation. The IRS had intervened, claiming a superior right to the $340,000 proceeds of the sale. The District Court had determined that Millers' claims prevailed over the IRS, and the IRS had appealed to the Eighth Circuit. The Eighth Circuit affirmed.

Separately, the IRS had seized other property (the "Fort Smith/Nashville Property") owned by the Foundation, and the Millers had sought in District Court for that property to be turned over to them. In this matter,

to allow the IRS to defeat the entire purpose of the receivership actions–for a Court to determine all claims to a *res* an then transfer it free and clear to a buyer–and thereby to

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which resulted in *Miller II*, the IRS argued that such was not the proper procedure for challenging the IRS's seizure, and that the United States had not waived sovereign immunity regarding the Fort Smith/Nashville Property. The District Court ruled that the prior intervention in the earlier proceeding regarding the $340,000 sale proceeds (*Miller I*) constituted a waiver of sovereign immunity regarding the Fort Smith/Nashville Property.

The Eighth Circuit reversed in *Miller II*, holding that the IRS intervention in the $340,000 matter, while a waiver of sovereign immunity for that matter, did not constitute a waiver of sovereign immunity regarding the Fort Smith/Nashville Property:

> We acknowledge the long-established principle "that when [G]overnment itself seeks its right at the hands of the court, equity requires that the rights of other parties interested in the subject-matter should be protected." Thus, when the United States brings a claim in court, it "'waives immunity as to claims of the defendant which assert matters in recoupment–arising out of the same transaction or occurrence which is the subject of the Government's suit.'" But this waiver does not extend "beyond the property in controversy." *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868). Those claims remain barred absent an unequivocal statutory waiver of sovereign immunity.
>
> These principles defeat the Millers' argument. The "property in controversy" the government intervened to claim was $340,000 in proceeds from the Millers' execution sale. Under the cases just cited, and more importantly under 26 U.S.C. 7424, the district court properly exercised jurisdiction over the Millers' adverse claim to that sum. It is equally clear, however, the government's intervention did not give the district court jurisdiction over the Millers' garnishment action on the Fort Smith/Nashville property. The Millers' execution sale proceeds and the Fort Smith/Nashville property are different matters, as we have observed before. (Some citations omitted).

violate the separation of powers requirements of the Constitution.[5, 6]

II. THE TENTH CIRCUIT OPINION INCORRECTLY RESOLVES A SEPARATION OF POWERS QUESTION BY CEDING A WELL-RECOGNIZED INHERENT POWER OF THE DISTRICT COURT WITHOUT ANY SHOWING CONGRESS INTENDED TO DO SO.

The Opinion below turns upon the assumption that Congress granted to District Courts supervising receiverships

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[5]This is not unfair to the IRS. All it need do to avoid this rule is not intervene as a party in a receivership. In this case, it had already filed a levy and gained nothing by its intervention.

[6]This same separation of powers issue has arisen repeatedly, the IRS continuing to disregard orders on the subject by the Courts. For example, *United States v. Middle States Oil*, 18 F.2d 231 (8th Cir. 1927), (cited as recently as 1993) holds:

> Counsel for the United States insist in their argument that the Court had no power to require the United States to file its claim within any particular time, and refer to the well-known doctrine that the United States is not bound by any statute of limitations. . . . The government insists that it has the right to file its claim for taxes apparently at any time it chooses, regardless of any orders or rules or procedure of the district court. We do not so understand our general scheme of government. The statute is not one involving any statute of limitations or question of laches, but involves a question of whether the administration branch of government may ignore and refuse to accede to rules of the judicial branch made for the purpose of carrying out orderly judicial procedure and administering justice. We see no reason why the court could not make the show cause order. [18 F.2d at 238 (emphasis added).].

See also Phelan v. Middle States Oil Corporation, 15 F.2d 88 (N.D. Tex. 1926) (where receivership was held open an extra year at the request of the Unites States Attorney so that taxes could be quantified, but still were not quantified, proper to pay all creditors over objection of IRS).

the authority to issue declaratory relief by enacting the Declaratory Judgments Act, 28 U.S.C. § 2401 (the "Act"). As the Act expressly excludes the authority to issue declaratory relief regarding taxes, the Court of Appeals reasoned, the District Court lacks authority to do so.

The error by the Court of Appeals was in failing to realize that District Courts supervising receiverships have inherent power to issue declaratory relief and had been exercising it long before the Act was passed. As Congress did not give the Courts this power, and since there is no reason to believe it was intending to limit this inherent power when Congress amended the Act to exclude tax issues, the Court of Appeals should have affirmed the District Court Order that the IRS (which had intervened in the Receivership Action) complete its assessment of any taxes due by the Receivership Estate by a reasonable date or be barred from assessing them later.

A. In this *In Rem* Action the District Court had Power to Issue Declaratory Orders, any other Provision of Title 28 Notwithstanding.

Prior to the passage of the Act receivership courts routinely entered declaratory relief.[7] They could do so because, once a receivership was established, a District Court had inherent power to issue any order necessary to wind-up a receivership. *E.g., Riehle v. Margolies*, 279 U.S. 218 (1929).

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[7] *E.g., Commonwealth Trust Co. v. Bradford* 297 U.S. 613 (1936) (entering declaratory judgment prior to the passage of the Act); *Harr v. Pioneer Mechanical Corporation*, 65 F.2d 332, 335 (2nd Cir. 1933) (court sitting in equity had inherent power to issue declaratory relief ancillary to case in chief); *Chicago Bank of Commerce v. McPherson*, 62 F.2d 393, 394 (6th Cir. 1932) (court sitting in equity had inherent power to issue declaratory relief ancillary to case in chief despite "federal rule against declaratory judgments.").

Riehle, still the leading case on receiverships, questioned whether a District Court had the authority to enter an injunction against a state court to prohibit its interference with the receivership being supervised by the District Court. At the time, the Judicial Code (then Title 26) expressly prohibited such an injunction.[8] The District Court entered an injunction anyway, and this Court affirmed, stating that a District Court supervising a receivership had the power to issue:

> any order . . . necessary for the preservation, collection, and distribution of the assets. . . .And it may, despite section 265 of the Judicial Code (28 U.S.C. § 379), issue under section 262 (28 U.S.C. § 377), or otherwise, all orders necessary to protect from interference all property in its possession exclusive jurisdiction to determine all judicial questions concerning that property.

Thus in *Riehle*, just as in this case, a statute expressly restricted the federal courts' power. The fact that *Riehle* was a receivership, however, made that restriction inapplicable. Under *Riehle*, a receivership court has inherent power to enter "any order necessary for the collection, preservation, and distribution of assets." This is true notwithstanding "any provision of Title 28 to the contrary." The Court of Appeals Opinion in the case at bar squarely conflicts with *Riehle*, and

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[8] "Section 265" of the judicial code, the current version of which is 28 U.S.C. § 2283, provided at the time of *Riehle*: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." 36 Stat. 1162, Ch. 231, A 265 (1911). *Riehle* was not a bankruptcy, it was a receivership, thus the express exception did not apply and the statute, on its face, did apply.

squarely conflicts with hundreds of years of receivership law which are to the same effect.

Riehle was not new receivership law. *Wabash Railroad v. Adelbert College,* 208 U.S. 38, 54 (1908) held:

> When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. . . . For the purpose of avoiding injustice which might otherwise result, a court during the continuance of its possession has, an incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession or the control of the property.

Once a receivership is established, it is necessary that a receivership court have such jurisdiction; otherwise, a receivership might never be wound up.[9] As a result, for hundreds of years receivership courts have exercised jurisdiction beyond what is provided for in Title 28 or, indeed, provided for in Article III of the United States Constitution. *See also White v. Ewing,* 159 U.S. 36, 39 (1895):

> [W]here an insolvent corporation is placed in the hands of a receiver of the circuit court,

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[9]Much of the development of what was originally called auxiliary, pendent, or ancillary jurisdiction and now called supplemental jurisdiction, as codified in 1990 at 28 U.S.C. § 1367, was driven by receivership cases. *E.g., Wabash R. Co. v. Adelbert College*, 208 U.S. 38 (1908). The reason behind this is obvious: If the Court has possession of a thing or *res*, it must be able to address all claims to that *res*, else it will not be able to deliver clean title when the *in rem* proceeding is concluded.

such appointment draws to the jurisdiction of that court the control of its assets, so far as persons having claims to participate in the distribution of such assets are concerned . . . . [Such] . . . parties must go into that court in order to assert their rights, prove their demands, and receive what ever may be due them, or their share or interest in the estate. [T]he Court proceeds **upon its own authority** to collect the assets of an estate, with the administration of which it is charged; and, if the receiver in such cases appears as a party to the suit, it is only because he represents the **court in its inherent power to wind up the estate of an insolvent corporation, over which it has by an original bill obtained jurisdiction.** (Emphasis added.)[10] When

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[10]Lest the Court think *Riehle, Wabash Ry., White, et al.* are aberrations, there are numerous other cases which contain the same general principal, *i.e.*, a court acting *in rem* may enter any order necessary to collect, preserve, and distribute assets. *Ex parte Baldwin*, 291 U.S. 610, 615 (1934) (court may issue injunction to protect its jurisdiction from interference due to general principle that, where a court of competent jurisdiction has, through its officers, taken property into its possession, the court may issue all writs necessary to protect its possession from physical interference); *United States v. Tabor Court Realty Corp*, 943 F.2d 335, 341 (3rd Cir. 1991) (appointment of receiver confers upon the court federal jurisdiction to decide all questions incident to the preservation, collection and distribution of assets whether such questions are raised in the original suit or ancillary proceedings); *Tcherepnin v. Franz*, 485 F.2d 1251, 1255-56 (7th Cir. 1973) (so long as an action commenced by a court-appointed receiver seeks to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is ancillary so far as the jurisdiction of the federal court is concerned); *In re Cuyahoga Finance Co.*, 136 F.2d 18 (6th Cir. 1943) (appointment of receiver confers upon court jurisdiction to decide all questions incident to preservation, collection, and distribution of assets); *Doyne v. Saetelle*, 112 F.2d 155, 162(8th Cir. 1940) ("Federal court may grant injunction without violating § 265 when proceeding in State court affects the control, possession or disposition of a *res* of which the federal

the receiver moved to have the IRS address the tax issues, the receiver did so as an officer of the Court, not as a representative of a private party. *Porter v. Sabin*, 149 U.S. 473, 479; *U.S. v. Smallwood*, 443 F. 2d 535, 539 (8th Cir. 1971), *cert. denied*, 404 U.S. 853 (1971). In seeking that relief the receiver represented "the court in its inherent power to

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court has first acquired jurisdiction"); *Genecov v. Wine*, 109 F.2d 265, 267 (8th Cir. 1940) (noting that actual or constructive possession of debtor's property gives court exclusive rights to determine all questions incident to collection, preservation and distribution of such property); *Taylor v. Producers Pipe & Supply Co.*, 114 F.2d 785, 788 (10th Cir. 1940) (receivership court has jurisdiction to decide all matters in dispute and decree complete relief); *Warder v. Brady*, 115 F.2d 89 (4th Cir. 1940) (receiver has federal jurisdiction to decide all questions incident to preservation, collection, and distribution of assets and "may, despite section 265 of the Judicial Code (28 U.S.C. § 379) issue under section 262 or otherwise, all writs necessary to protect from interference all property in its possession"); *Texas Co. v. Hauptman*, 91 F.2d 449, 454 (9th Cir. 1937) (power of court to issue injunction to protect its jurisdiction is an application of the general principle that, where a court of competent jurisdiction acquires possession of property, the court may issue all writs necessary to protect its possession from physical interference and determine all questions respecting the same); *Orcutt v. Crawford*, 85 F.2d 146, 147 (10th Cir. 1936) (receivership court has power to decide all questions relating to the preservation, collection, and distribution of the assets, including making of orders in the original proceeding and cognizance of ancillary actions appropriately instituted by the receivers in behalf of the estate); *Irving Trust Co. v. Fleming*, 73 F.2d 423, 427 (4th Cir. 1934) (where a court of competent jurisdiction has taken possession of property, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same); *KeSun Oil Co. v. Hamilton*, 61 F.2d 215, 219 (9th Cir. 1932) (federal receivership court may, despite section 265 of the Judicial Code (28 U.S.C.A. § 379), issue under section 262 (28 U.S.C.A. § 377), or otherwise, all writs necessary to protect from interference all property in its possession); *Toledo, St. L. & K.C.R. Co. v. Continental Trust Co.*, 95 F. 497 (6th Cir. 1899) (where receiver court has possession of all property, court has jurisdiction over all suits and proceedings with respect to the property).

> wind up" the receivership estate. *White v. Ewing*, 159 U.S. at 40. When the District Court entered the subject orders it did not do so to "assist a taxpayer in bypassing" IRS procedures, as characterized by the court of appeals. 245 F.3d at 1167. To the contrary, the District Court entered those orders pursuant to the "inherent power . . . necessarily vested in courts to achieve the orderly and expeditious disposition of cases." *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31 (1962) (internal quotation marks omitted) and only after the IRS indicated it could meet the timetable established by the District Court.[11]

The leading commentator on receiverships describes the proposition as follows:

> When a court of equity takes into its possession property and appoints a receiver thereof, it is the court's duty to protect that property against the wrongful act of anyone, be he party to the original suit or other person. Ordinary processes of the law can reach and appropriate the property *in custodia legis*. . . . This jurisdiction exercised by the appointing court is called auxiliary jurisdiction and sometimes called ancillary jurisdiction.
> **A court which is administering property already in its hands through a receivership may properly**

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[11] It cannot be disputed that the District Court found the orders were necessary to wind-up and terminate the receivership. "Until the tax liabilities of the various entities are determined, it will not be feasible to wind-up the receivership. Magistrate Judge Schlatter's Order of May 9, 2000 represents an effort to resolve the question of tax liabilities so that the receivership can be terminated." (App ??)

> **draw to itself all disputes as to liens and other rights upon or pertaining to such property**. This is done on the broad principle that every court has inherent equitable power to prevent its own process from working injustice to anyone and may entertain a petition by an aggrieved person, either in the form of a simple motion or by intervention *pro interesse suo* in the case in which the process issued, by auxiliary or dependent bill in equity.

1 Ralph Ewing Clark, *Clark on Receivers* § 280 (4th Ed. 1959) (emphasis added; citations omitted).

In short, the Act did not "grant" the right to issue a declaratory judgment to a receivership court, as the Court of Appeals incorrectly stated. A receivership court already had that right as an inherent power.[12]

In the case at bar, the Court of Appeals said, "there are no relevant exceptions under the Declaratory Judgment Act that permit the district court to determine their tax liabilities." 245 F.3d at 1166. It also said, "the Anti-Injunction Act prohibits the district court from enjoining the IRS from assessing and collecting the corporations taxes for failure to evaluate their tax returns by the court-imposed deadline." *Id.*, at 1167. **Not once in its opinion did the court acknowledge the *in rem* nature of the receivership**, nor the copious opinions from this Court which hold that Title 28 does not affect the inherent power of a District Court supervising a receivership. It did not recognize the District Court's "exclusive jurisdiction to determine all judicial questions concerning the *res*." *Wabash Railroad,* 208 U.S. at

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[12]To complete the thought, what the Act granted was the power to a court sitting at law, or with no other equitable claims before it, the right to enter declaratory relief. As the cases cited in note 10 show, a court sitting supervising a receivership already had that authority.

38. Nor did it recognize the District Court's inherent power to enter to subject orders. That was its fatal error.[13]

At the time of the District Court orders concerning the tax issues the *res* of the receivership consisted in part of approximately $1.2 million derived from the 1999 sale. All of the receivership's creditor and administrative claims had been paid in full. Quantifying the supposed federal income tax liabilities payable from the *res* was the last major obstacle to winding up the receivership.[14]

In this circumstance, we have a distinguished, senior federal judge waiting for a mid-level bureaucrat **who intervened in her courtroom** to decide that the District Court's agenda is sufficiently important for the bureaucrat to complete an assessment that could have been completed

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[13] In the Opinion, the Court of Appeals stated that the Declaratory Judgments Act was jurisdictional. 245 F.3d at 1166. This is squarely in conflict with opinions of this Court. *E.g. Schilling v. Rogers*, 363 U.S. 666, 677 (1960) (the Act is merely remedial, not jurisdictional); *Skelly v Phillips*, 339 U.S. 667, 671 (1950) (Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction); *Aetna v. Haworth*, 300 U.S. 227, 240 (1937) ("Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish.").

[14] The District Court had also ordered the IRS to complete its assessment of three related bankruptcies. This was also reversed in the Court of Appeals' Opinion. The Receiver does not seek certiorari on this issue; only on the issue of receivership taxes. The receiver also notes that the Tenth Circuit Opinion, claiming the receiver was relying on 26 U.S.C. § 505(b) for authority for the District Court to order the IRS to complete its assessment of receivership taxes, is incorrect, and probably arose out of the Tenth Circuit's confusion in this regard. The receiver was relying on § 505(b) for authority to order the IRS to assess on the Bankruptcy Cases. As to the receivership taxes, the subject of this petition, the receiver relied on *Riehle v. Margolies, supra,* and the other cases discussed in that section of this Petition.

years ago. Simply put, the Tenth Circuit resolved that separation of powers issue by ceding an inherent power to the bureaucrat, and it should have been resolved in favor of the Judge.

B. The Legislative History of the Declaratory Judgment Act Shows It Was Not Intended to Restrict the Inherent Power of the District Court.

Since it is clear under the above cited authorities (and others too numerous too list here) that a receivership had jurisdiction to enter a declaratory order **before** passage of the Act, the questions raised are (a) whether Congress could take away such authority and (b) whether Congress, in fact, did so. Although the answer to the former is unclear, the answer to the latter is clearly, "no".

As enacted in 1934, the Declaratory Judgment Act contained no exception for tax issues. It was amended in 1935, however, to add the "tax exception." The House of Representatives, Conference Report 74-1-1885 (August 22, 1935) provides the entirety of the legislative history on that exception as follows:

> DECLARATORY JUDGMENTS AS TO TAXES
>
> The Amendment also adds a section making it clear that **the Federal Declaratory Judgments Act of June 14, 1934 has no application to Federal Taxes**. (Emphasis added.)

This history shows that the tax exception affects only the statutory remedy originally granted in the 1934 Act, and was not intended to restrict the pre-existing inherent power of federal receivership courts, confirmed by the decisions of this

Court, to enter "any order" necessary for the distribution of assets, "any other provision of Title 28 notwithstanding." If Congress had intended the tax exception to restrict that power, that intent surely would appear in the legislative history. Congress' silence on the matter effectively disclaims such an intention. *E.g.*, *INS v. St. Cyr*, __ U.S. __, 121 S. Ct. 2271, 2290 n.44 (2001) (finding silence in legislative history significant on the theory that "where construction of legislative language makes so sweeping and so relatively unorthodox a change as that [purportedly] made here, . . . judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.") (internal quotation marks and citation omitted).

Moreover, the legislative history expresses an intent to change only the "application" of the Act, thus there is no hint Congress intended to try to take away a long-standing, inherent power. Given the breadth of powers then enjoyed by receivership courts, if Congress had intended to limit those powers it would have said so. To find a broader congressional intent would be contrary to established rules of statutory construction. *E.g.*, *United States v. American Bell Telephone*, 159 U.S. 548 (1895) (where statute purports to restrict otherwise existent jurisdiction, it must be narrowly construed); *Heno v. Federal Deposit Ins. Corp.*, 996 F.2d 429 (5th Cir. 429) (enactments limiting federal court jurisdiction are to be narrowly construed); *Magno v. United States*, 636 F.2d 714 (D.C. Cir. 1980) ("in areas where Congress has limited judicial review over questions which are within the normal competence of the courts, those jurisdictional limitations are interpreted narrowly . . .").

The Court of Appeals was concerned that the District Court's determination of tax questions would impede the government's collection and assessment of taxes. 245 F.3d at 1166. That concern is misplaced in the present setting. The District Court did not drag the IRS into this case. Instead, the

IRS injected itself into this case on its own motion. By voluntarily intervening, without condition or qualification, the IRS made itself "vulnerable to complete adjudication" by the District Court of the issues in litigation. *United States v. State of Oregon*, 657 F.2d at 1014; *Alvarado v. J.C. Penney Co.*, 997 F.2d at 805. It thereby acceded to the District Court's jurisdiction to decide "all questions respecting the title, the possession or the control of the" receivership property. *Wabash Railroad v. Adelbert College*, 208 U.S. 38, 54.[15]

Further, it should be noted that the IRS does not suggest it could not have finished its assessment on the time table Ordered by the District Court. Rather, it simply argues that it cannot be made to do so. Having intervened in the

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[15]The proper defense to a receiver trying to obtain a declaratory judgment regarding taxes when the IRS has not intervened is not found in the Act, but in the doctrine of sovereign immunity. The intervention, however, waived that sovereign immunity for all purposes relating to the *res* in an *in rem* case. *United States v. The Thekla*, 266 U.S. 328, 340-341 (1924) ("When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with respect to the subject matter."); *The Siren*, 74 U.S. (7 Wall) 152,153 (1868) ("[W]hen [the United States] proceed *in rem*, they open to consideration all claims and equities in regard to the property libeled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and affirmative relief against them, beyond the demand or property in question."). *See also Cororporacion Mexicana de Servicios Maritimos, S. A. di C. V. v. The M/T Respect*, 89 F.3d 650,656 (3rd Cir. 1996) (by intervening in an *in rem* action agency of the Mexican Government waived sovereign immunity). As payment of taxes is necessarily something that affects the *res*, an Order that the IRS complete its assessment in a reasonable time is proper.

The Tenth Circuit decision is contrary to *The Thekla, The Siren*, and the cited decisions of the Ninth Circuit. It is also contrary to an earlier Tenth Circuit decision, *Alvarado v. J.C. Penney Co.*, 997 F.2d 803, 805 (10th Cir. 1997).

case, it has waived sovereign immunity and must be treated like any other party. *See* n.15.

III. THE OPINION IS ALSO CONTRARY TO PRIOR OPINIONS OF THIS COURT RECOGNIZING JUDICIALLY-CREATED EXCEPTIONS TO THE ACT

Even if, contrary to the analysis above, the Act did govern the District Court's power in this case, the tax exception of the Act would not apply. This case falls within both of two judicially-created exceptions to that exception, which authorize declaratory relief when, as here, (1) the taxpayer has no other forums for relief; and (2) the IRS has no chance to prevail on the merits. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-737 (1974) (recognizing two unwritten, judicially created exceptions to the prohibition on declaratory judgments regarding federal taxes); *Elia v. Connet*, 908 F.2d 521, 523, 526 (9th Cir. 1990) (same); *In re State of Cal. v. Regan*, 641 F.2d 721, 722-23 (9th Cir. 1981) (same).

The receiver cannot get relief outside the receivership court. The receiver is an arm of the District Court and the District Court has exclusive jurisdiction over claims, including the tax claims of the United States. *E.g.*, 28 U.S.C. § 959; *Wabash Ry. Co. v. Adelbert College*, 208 U.S. 38, 53 (1908) (receivership court's possession of the property gives such court exclusive jurisdiction to hear and determine all questions affecting title, possession, or control of the property); *Oppenheimer v. San Antonio Land & Irrigation Co.*, (5th Cir. 1917) (an effect of the receivership court's

taking possession was withdrawal of the property from the jurisdiction of all other courts); 26 U.S.C. § 6871(c)(1)[16].

In *South Carolina v. Regan* 465 U.S. 367, 374 (1984), this Court held that the prohibition against injunctive suits would not apply if Congress did not provide the moving party with an alternative. Here, Congress has not provided an alternative. To the contrary, the IRS has simply refused to assess, despite its repeated admissions that it is capable of doing so. There appears to be no point to the IRS's actions except to prove that it is not subject to the power of the United States District Court, even in cases where it has intervened.

Moreover, the IRS cannot prevail in this case. For the IRS to prevail, it first must assess. It has not done so, and until it does the Court must rely on the receiver's CPA and the original IRS field agent working on this case, both of whom indicated no taxes are due. In short, there is no claim for taxes upon which the IRS can prevail.

Further, for there to be a tax, the IRS must either reallocate sale proceeds[17] that were distributed long ago or

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[16]The exceptions reflect that the Acts apply only in the typical situation where a taxpayer invokes the District Court's *in personam* jurisdiction despite alternative remedies. The Acts were not designed for this unusual situation, where the District Court's *in rem* powers as a receivership give it exclusive authority to resolve the tax issues based upon the IRS's intervention under Fed.R.Civ.P. 24.

[17] The IRS has suggested that it can re-allocate the sale proceeds only for tax purposes under 26 U.S.C. § 482. That section can only be invoked, however, against a "controlled taxpayer." As set forth in Treasury Regulation § 1.482-1A(b), "[t]he purpose of section 482 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer ... [where the] standard to be applied in every case is that of an uncontrolled taxpayer dealing at arms length with another uncontrolled taxpayer." The leading case on the application of 26 U.S.C. § 462 is *Commissioner of Internal Revenue v. First Security Bank of Utah* 405 U.S. 394, 400 (1972).

disregard Orders that were entered while it was a party. For the IRS to prevail, it must show that the Trustee or the receiver was under the "control" of another taxpayer. As both fiduciaries were under the control of their respective Courts, neither was under a "controlled taxpayer" within the meaning of 26 U.S.C. § 482. If this Court has any doubt about the IRS's chances of prevailing, the proper course is a remand to the District Court for a determination of the "*Bob Jones* exceptions."[18]

CONCLUSION

The decision of the Tenth Circuit ignores controlling precedent and thereby reached an erroneous result. By intervening without qualification or condition, the IRS waived sovereign immunity and acceded to the District Court's exclusive jurisdiction to answer all questions question affecting the receivership property. This included the inherent power to issue declaratory relief.

The Court had inherent power to enter the subject orders, unaffected by the Declaratory Judgment or Anti-Injunction Acts. Both Acts were intended to keep the judicial branch from interfering with the executive branch at the behest of a private taxpayer. That intention is not implicated when the executive branch intervenes in a receivership, and, in order to wind-up that receivership, the District Court orders the executive branch to do its job within a reasonable time. Unless the court has that power, the judicial branch becomes subordinate to the executive branch. The decision of the Tenth Circuit cedes an inherent power of the District

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[18] A remand to determine whether either *Bob Jones* exceptions applies will go a long way to getting the Receivership Estate past the procedural roadblock the IRS has created. To respond, the IRS will have to do its job and quantify taxes owed, which is all the Order reversed by the Opinion required it to do in the first place.

Court and deprives the District Court of necessary remedies to properly administer the receivership.

The Tenth Circuit opinion is also contrary to well-established principles governing *in rem* proceedings, and cannot be correct. In an *in rem* proceeding, a court must be able to address all claims to the *res*, and this includes tax claims. If the IRS did not desire to have its tax claim heard by the receivership court, all it needed do was . . . nothing. By not intervening, it would not have waived sovereign immunity and not subjected itself to Article III.

Finally, even if the Tax Limitation Acts apply, the Tenth Circuit should have remand for determination of the *Bob Jones* exceptions, rather than simply reversing. Because the District Court had ruled that the Tax Limitation Acts did not apply, there had been no need for the *Bob Jones* exceptions to be addressed. As the Tenth Circuit was the first court to determine the Tax Limitation Acts do apply, an analysis of the *Bob Jones* exceptions by the District Court would be appropriate.

WHEREFORE, Sterling Consulting Corporation, as receiver, prays that this Court grant certiorari on the three questions submitted above, or any of them, and for such other and further relief as the Court deems just and proper.

Respectively submitted this 5th day of November, 2001.

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Supreme Court, U.S.
FILED
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No.

In the

Supreme Court of the United States

STERLING CONSULTING CORPORATION,
a Colorado corporation, as receiver for the
Indian Motorcycle Manufacturing Inc.,
a New Mexico corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPENDIX FOR WRIT OF CERTIORARI

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(Any footnotes trail end of each document)
No. 00-1317

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STERLING CONSULTING CORPORATION, a Colorado corporation, as receiver for the Indian Motorcycle Manufacturing Inc., a New Mexico corporation,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Intervenor-Appellant.

April 10, 2001, Filed

PRIOR HISTORY:
Appeal from the United States District Court for the District of Colorado. (D.C. No. 95-Z-777). D.C. Judge Zita L. Weinshienk.

DISPOSITION:
District court's judgments REVERSED.

COUNSEL:
Thomas J. Clark (Kenneth W. Rosenberg, with him on the briefs), Tax Division, Department of Justice, Washington, D.C., for Appellant.

John M. Tanner (Ann C. Kiley with him on the brief), Fairfield and Woods, P.C., Denver, Colorado, for Appellee.

JUDGES:
Before BRISCOE, BALDOCK, and MURPHY, Circuit Judges.

OPINIONBY:
MURPHY Circuit Judge.

OPINION:

MURPHY Circuit Judge.

I. INTRODUCTION

This case comes before the court on interlocutory appeal. The government appeals the district court's assertion of jurisdiction over the determination of tax liabilities in a receivership action and the district court's imposition of a deadline upon the IRS for such tax determinations. Exercising jurisdiction pursuant to *28 U.S.C. § 1292*(b), this court holds the Declaratory Judgment Act prohibits the district court from determining corporate tax liabilities in a receivership action and the Anti-Injunction Act bars the district court from enjoining the IRS from assessing and collecting taxes for failure to evaluate tax returns by the court-imposed deadline. The judgment of the district court is therefore **reversed**.

II. BACKGROUND

In April 1995, Eller Industries, Inc., a Colorado corporation, brought this receivership action in the United States District Court for the District of Colorado against Indian Motorcycle Manufacturing, Inc. (IMMI), a New Mexico corporation. The district court placed IMMI into receivership, appointing Sterling Consulting Corporation as

the receiver. During this time, IMMI was one of several companies embroiled in a dispute over the Indian Motorcycle trademark. Three other companies involved in the dispute, Indian Motocycle Company, Inc., Indian Motocycle Apparel & Accessories, Inc., and Indian Motocycle Manufacturing, Inc.[1],have been in bankruptcy in Massachusetts since before 1995, all sharing a common bankruptcy trustee.

In late 1995, the receiver acquired all of the stock of the bankruptcy estates and Indian Motor Company (IMC) from Michael Mandelman. In 1997, the government intervened in this action to enforce federal tax liens for individual income taxes owed by Mandelman against any forthcoming distribution by the receiver. The assets of the receivership estate and bankruptcy estates were combined for sale and eventually sold. Pursuant to an agreement between the bankruptcy trustee and the receiver, $ 3.5 million of the proceeds from the sale of assets was allocated to the bankruptcy estates and placed in an escrow account with the district court in Colorado. The account was established for the payment of claims owed by the bankruptcy estates, subject to the receiver's right to assert competing claims.

In October 1999, the receiver filed a motion with the district court in Colorado asking the court to determine that the bankruptcy estates owed no additional federal taxes above that shown on their tax returns for 1999.[2] The government opposed this motion, claiming the district court lacked jurisdiction to determine the tax liabilities of debtors who were in bankruptcy in Massachusetts.

In December 1999, the bankruptcy trustee filed an emergency motion in Massachusetts Bankruptcy Court seeking approval of his final accounts and distribution of the estates. The government objected to the motion and distribution. During the hearing on the motion in Massachusetts, the government indicated that the tax liabilities of the bankruptcy estates for 1999 would amount to

$ 1.2 million if the top corporate tax rate was applied to the $ 3.5 million allocated to the bankruptcy estates from the sale of the combined estates. It further indicated that the proposed escrow with the receiver of approximately $ 437,000 to cover the potential tax liabilities of the bankruptcy estates was insufficient.

The bankruptcy court entered an order approving the trustee's amended final accounts. In its order, the bankruptcy court attempted to "cede jurisdiction of the determination of the Bankruptcy Estates tax liabilities to the district court in Colorado." The bankruptcy court ordered that $ 1.2 million be disbursed from the bankruptcy estates to the receiver and that the receiver hold the money in escrow for the purpose of covering the potential 1999 tax liabilities of the debtors. The government appealed the bankruptcy court's findings, conclusions, and order to the Bankruptcy Appellate Panel for the First Circuit.[3]

In the meantime, the receiver's motion in federal district court regarding the bankruptcy estates' 1999 income tax liabilities was referred to a magistrate judge. In January 2000, the magistrate overruled the government's jurisdictional objections and ordered the government to respond to the merits of the receiver's motion. In an order entered on March 20, the district court adopted the magistrate's report and ruled that the court had jurisdiction over all matters affecting the receivership estate, including all questions incident to the preservation, collection, and distribution of assets. The court further ruled that it had jurisdiction to determine the bankruptcy estates' liabilities under *28 U.S.C. § 1334*(a), which confers upon the district courts "original and exclusive jurisdiction of all cases under title 11," and *28 U.S.C. § 1334*(b), which confers upon the district courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

The receiver filed a second motion in district court, asking the court to determine that IMMI and IMC owed no additional federal taxes beyond the amount set forth in their tax returns for certain designated years. The government opposed the motion on jurisdictional grounds, but the magistrate determined that the court had jurisdiction to determine IMMI's and IMC's tax liabilities. The magistrate ordered the IRS to address the merits of IMMI's and IMC's tax returns by August 31, 2000, and to address the merits of the 1999 tax returns for the bankruptcy estates by July 1, 2000. The magistrate further ordered that in the event the IRS failed to comply with the court's order, "the tax returns shall be deemed to have been completed correctly, and the estates shall be deemed to owe no further taxes." The government objected to the magistrate's order.

In an order entered on July 19, 2000, the district court affirmed the magistrate's order and overruled the government's objections. It extended until August 31, however, the deadline by which the IRS needed to address the merits of the bankruptcy estates' tax liabilities. In its order, the district court indicated that the issue of whether it had jurisdiction over the IRS's tax liability determinations for entities within the receivership estate was a controlling question of law as to which there was substantial ground for a difference of opinion.[4] In a separate order entered the same day, the district court also certified the question of whether it had the authority to set enforceable deadlines for such tax determinations. The court concluded that an immediate appeal of these questions would advance the ultimate termination of the case, thereby satisfying the conditions of *28 U.S.C. § 1292*(b). This court stayed the district court orders pending appeal.

III. DISCUSSION

This court's jurisdiction arises pursuant to *28 U.S.C. § 1292*(b), which allows this court to review the district court's

interlocutory order. *See Homeland Stores, Inc. v. Resolution Trust Corp., 17 F.3d 1269, 1271 (10th Cir. 1994).* The controlling questions of law certified by the district court involve (1) its jurisdiction over the government's tax liability determinations for entities within the receivership estate, which includes the debtor corporations in this case, and (2) the district court's authority to set enforceable deadlines for these tax determinations.[5] On appeal, the government claims the district court lacks jurisdiction to determine the income tax liabilities of the five corporations. Further, it argues the district court lacks jurisdiction to order the IRS to complete a tax examination before the expiration of the statutory deadline and to permanently enjoin the assertion of tax liabilities if the IRS fails to meet the court's deadline. This court reviews questions of law, including determinations of jurisdiction, *de novo. See Sac & Fox Nation of Mo. v. Pierce, 213 F.3d 566, 571 (10th Cir. 2000).*

A. Determination of Tax Liabilities

The Declaratory Judgment Act empowers courts to "declare the rights and other legal relations of any interested party seeking such a declaration." *28 U.S.C. § 2201*(a). The grant of authority, however, explicitly excludes cases "with respect to Federal taxes." *Id.* The Act exempts specified proceedings from this general exclusion, thereby allowing declaratory judgments in certain cases that involve federal taxes. *See id.* The exemptions include civil actions involving an antidumping or countervailing duty proceeding and actions brought under *26 U.S.C. § 7428,* which allows for a declaratory judgment with respect to tax-exempt status, and *11 U.S.C. § § 505* or 1146, both of which provide for a determination of taxes for entities in bankruptcy. *See id.* In its motions to the district court regarding the tax liabilities of the five corporations, the receiver requests relief that the Declaratory Judgment Act specifically prohibits the court

from granting. Absent the application of an exception to the statutory prohibition, the Declaratory Judgment Act plainly bars the district court from declaring that the corporations in question owe no additional federal taxes. To hold otherwise would impede the government's ability to assess and collect taxes. *See Wyo. Trucking Ass'n, Inc. v. Bentsen, 82 F.3d 930, 932-33 (10th Cir. 1996).*

As for IMMI, the corporation in receivership, and IMC, a corporation owned by the receiver, there are no relevant exceptions under the Declaratory Judgment Act that permit the district court to determine their tax liabilities. In its motion to the district court regarding the tax liabilities of IMMI and IMC, the receiver did not invoke any exception to the statutory bar and it is apparent from this court's own review that none apply. Thus, the Declaratory Judgment Act explicitly prohibits the district court from granting the requested relief for IMMI and IMC.

In its motion involving the bankruptcy estates' tax liabilities, however, the receiver invoked the power of a district court to make a determination of taxes under *11 U.S.C. § 505,* with *28 U.S.C. § 1334*(b) providing the jurisdictional authority.[6] Although a proceeding under *11 U.S.C. § 505* is exempted from the statutory bar against declaratory judgments with respect to federal taxes, the exception does not apply in this case because the receiver's motion in federal district court does not properly invoke § 505.

Section 505 authorizes bankruptcy courts to "determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid." *11 U.S.C. § 505*(a)(1). This court has previously indicated that "section 505 gives federal courts authority to determine, *in bankruptcy proceedings*, the amount and legality of any tax." *City Vending of Muskogee, Inc. v. Okla. Tax Comm'n, 898 F.2d 122, 124 (10th Cir.*

1990) (emphasis added). The receiver cannot invoke § 505 in this case because the proceeding in federal district court is a receivership action, not a bankruptcy proceeding. Even though § 1334(b) confers jurisdiction on a district court to make a determination of tax liability under § 505, the purpose of § 1334(b) is "to allow district courts in which the bankruptcy case is filed to adjudicate bankruptcy-related actions." *Gruntz v. County of L.A. (In re Gruntz), 202 F.3d 1074, 1083 (9th Cir. 2000).* The receiver's request for a determination of taxes is not related to a bankruptcy proceeding under title 11 in federal district court because there is no such proceeding in the district court. Thus, the district court does not have jurisdiction to provide the requested relief pursuant to § 1334(b) because the action neither arose in, nor was related to, a bankruptcy action in the district court.[7]

Furthermore, the bankruptcy court's attempt to cede jurisdiction over the determination of tax liabilities did not effectuate a transfer of the bankruptcy proceeding to the district court in Colorado pursuant to *28 U.S.C. § 1412,* which might have conferred jurisdiction on the district court over a § 505 action. *See 28 U.S.C. § 1412* ("A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties."). The bankruptcy court did not address the applicability of § 1412 during its hearing on the bankruptcy trustee's motion to approve final accounts or in its order entered two days after the hearing. The court simply indicated that it would cede jurisdiction over the determination of federal taxes to the district court in Colorado because the receiver had the greatest stake in the outcome. Because the bankruptcy court did not transfer the case, there was no bankruptcy proceeding before the district court which would render proper a motion filed under § 505 in Colorado's federal court. Accordingly, the § 505 exception to the prohibition against declaring the rights of parties with

respect to federal taxes does not apply in this case. This court concludes the Declaratory Judgment Act prohibits the district court from declaring that the bankruptcy estates owe no additional federal taxes.

B. Enjoining the IRS

Having decided that the district court has no authority to determine the corporate tax liabilities in this case, this court must turn to the question of whether the district court may enjoin the IRS from determining the tax liabilities of the five corporations should the government fail to consider the corporate tax returns by the court-imposed deadline. The district court characterizes its order as an attempt to set deadlines and create procedures as it would for any party that comes before it. This court agrees, however, with the government's characterization of the district court's order as an attempt to enjoin the IRS from assessing and collecting taxes.

The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." *26 U.S.C. § 7421*(a). The Act specifically divests the district court of jurisdiction in order to prevent pre-assessment judicial interference. *See Wyo. Trucking Ass'n, Inc., 82 F.3d at 933.* A statutory framework exists for the determination of taxes by the IRS. *See, e.g., 26 U.S.C. § § 6201*(a) (authorizing and requiring the government "to make the inquiries, determinations, and assessments of all taxes" imposed by the *Internal Revenue Code), 6501(a)* (requiring the government to assess tax liabilities within three years of tax return filing). The district court may not assist a taxpayer in bypassing these procedures by imposing deadlines upon the government simply because the IRS is a party before it. Accordingly, this court concludes the district court lacks the

jurisdiction to enjoin the IRS from assessing and collecting taxes for failure to expedite its determination of taxes.

IV. CONCLUSION

This court holds the Declaratory Judgment Act bars the district court from declaring that the five corporations owe no additional federal taxes. We further hold the Anti-Injunction Act prohibits the district court from enjoining the IRS from assessing and collecting the corporations' taxes for failure to evaluate their tax returns by the court-imposed deadline. Accordingly, the district court orders requiring the IRS to address the merits of the tax returns for the five corporations and prohibiting the government from determining the tax liabilities for failure to comply with the court-imposed deadline are **REVERSED**.

Footnotes

[1] Indian *Motocycle* Manufacturing, Inc. is not to be confused with the company in receivership, Indian *Motorcycle* Manufacturing, Inc.

[2] The original motion included the years 1993 through 1999, but the bankruptcy trustee, the receiver, and the IRS agreed that the tax returns for the years before 1999 were correct with the exception of one deduction.

[3] The Bankruptcy Appellate Panel disposed of this appeal on March 13, 2001, holding that the bankruptcy court erred in ceding jurisdiction to the federal district court in Colorado and reversing the bankruptcy court's order which capped the determination of the debtors' tax liability at $ 1.2 million and made a final distribution of the estates.

[4] A thorough reading of the district court's order suggests that it means to include the three debtor corporations in its reference to "receivership estate."

[5] Also before this court is the government's motion to strike the receiver's first submission of supplemental authority. Because the receiver's submission contains legal arguments, this motion is granted. *See* Fed. R. App. P. 28(j) ("The letter informing the court of supplemental authority must state *without argument* the reasons for the supplemental citations. . . ." (emphasis added))

[6] Section 1334(b) gives district courts original jurisdiction over all civil proceedings "arising under title 11, or arising in or related to cases under title 11." *28 U.S.C. § 1334*(b).

[7] For the same reasons discussed *supra*, *28 U.S.C. § 1334*(a) does not confer the requisite jurisdictional authority upon the district court. *See 28 U.S.C. § 1334*(a) (providing district court with original and exclusive jurisdiction of all cases under title 11).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 95-Z-777

ELLER INDUSTRIES, INC.,
Plaintiff,

V.

INDIAN MOTORCYCLE MANUFACTURING, INC.,
Defendant,

V.

UNITED STATES OF AMERICA,
Intervenor.

ORDER REGARDING TAX ISSUES

ORDER ENTERED BY MAGISTRATE JUDGE O. EDWARD SCHLATTER

This matter comes before the Court upon two motions of Sterling Consulting Corporation, as receiver. The first motion, that no additional taxes are owed by the Bankruptcy Estates, is supported by affidavits of both Stephen M. Rodokalis, as Trustee and the Trustee's Certified Public Accountant. I have reviewed the receiver's Motion, the IRS's Response, the receiver's Reply, and the IRS's Sur-Reply. Further, this Court held hearings on both March 29, 2000, and April 27, 2000.

Regarding the tax returns for tax years before 1999, the receiver, the Trustee, and the IRS have agreed that the tax

returns which were filed are correct save for the treatment of one deduction. This change has been made, and the Court now understands there is no dispute as to those tax years. All that is left is the Trustee's *1999* tax returns.

The receiver asks this Court to enter an Order that no additional taxes are owed by the Trustee in Bankruptcy beyond what is shown on the *1999* tax returns which were attached to the motion. This is of interest to the receiver. If the money is paid in taxes, then it will not be available to the receivership. The receiver is both a claimant in the Bankruptcy Estates and the equity owner of the companies in bankruptcy.

The IRS has previously argued that this Court lacks jurisdiction to make such a determination. Judge Weinshienk ruled on March *16,* 2000, however, that this Court does have such jurisdiction. The IRS now argues that it has not had time to evaluate the tax returns to determine whether they are correct or if more taxes are owed. It has begun an audit of that return, and is scheduled to complete it shortly. Counsel for the IRS has indicated she has every confidence the IRS can reach a determination on the tax returns within several weeks.

By my order of January 10, 2000, I gave the IRS until January 20, 2000, to address the merits of the tax returns. The IRS appealed that ruling, and it was affirmed by Judge Weinshienk on March *16,* 2000. The IRS has not yet addressed the issue of the merits of the correctness of the *1999* tax return.

The second motion is the receiver's motion that the tax returns of Indian Motorcycle Manufacturing, Inc. (for tax years *1995 - 1999)* and Indian Motor Company (for tax years 1993 1 *999)* are true and correct. This motion was filed March 3, 2000, and is supported by the affidavit of Richard

Block, as president of the corporation that is the receiver. The affidavit discloses both those corporations have been dissolved. The IRS responded March 27, 2000, again arguing this Court did not have subject matter jurisdiction to hear the issue. For the reasons stated in my Order of January 10, 2000, and Judge Weinshienk's Order of March *16,* 2000, the Court does have jurisdiction.

It is therefore ORDERED that the IRS shall have until July 1, 2000, to address the merits of the *1999* tax return for the Bankruptcy Estates. The receiver shall have fifteen *(15)* days thereafter to reply. The IRS shall have until August 31 , 2000, to address the merits of the tax returns of Indian Motorcycle Manufacturing, Inc. (for tax years *1995 - 1999)* and Indian Motor Company (for tax years I 993 - I 999). The receiver shall have fifteen *(1* 5) days thereafter in which to reply.

It is FURTHER ORDERED that in the event that the IRS fails to conclude its consideration of the returns for the receivership and Bankruptcy Estates in compliance with the above dates, the returns shall be deemed to have been completed correctly, and the estates shall be deemed to owe no further taxes.

It is FURTHER ORDERED that this Court will hold a status conference regarding the tax Issues on May 30, 2000, at the hour of 3:00 p.m. in Room C-I 62 of the U.S. Courthouse located at 1929 Stout Street, Denver, Colorado.

Dated at Denver, Colorado, this day of: May 9, 2000

BY THE COURT:

O.Edward Schlatter
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 95-Z-777

ELLER INDUSTRIES, INC.,
Plaintiff,

v.

INDIAN MOTORCYCLE MANUFACTURING, INC.,
Defendant.

ORDER REGARDING RECEIVER'S MOTION FOR DETERMINATION REGARDING FEDERAL TAXES ORDER ENTERED BY MAGISTRATE JUDGE O. EDWARD SCHLATTER

The Receiver has filed a Motion for Determination That No Additional Taxes are Owed by Bankruptcy Trustee. The Internal Revenue Service (IRS) is the only party which is involved with this particular proceeding, and it has filed objections to the jurisdiction and propriety of this court hearing the Receiver's motion. It argued that the appropriate court to resolve the dispute was the Bankruptcy Court in Massachusetts, and that this court should not attempt to "oust" that court of its authority and jurisdiction. The IRS did not in its Response to the motion address the merits of the controversy.

Counsel for the Receiver, Mr. Jack Tanner, has informed me that a hearing on the subject of the Receiver's motion was conducted before Honorable Henry Boroff, Judge of the Bankruptcy Court for the District of Massachusetts, on December 28, 1999, and that Judge Boroff has ordered as follows: (1) that the underlying res, some $1 .2 million, be held in escrow by the Receiver here in the District of

Colorado, and (2) that because the Receiver is the party which is primarily affected by rulings with regard to the $1.2 million, the dispute with regard to taxation should be resolved in Colorado.

In light of the rulings of Judge Boroff, it is therefore ORDERED as follows:

1. The objections of the IRS with regard to the assertion of this court's jurisdiction over the subjects which are addressed in the Receiver's Motion for Determination of Taxe are overruled.

2. The IRS shall have until January 20, 2000, within which to respond to the merits of the Receiver's motion.

3. A hearing on the Receiver's motion shall be held on February 24, 2000, at the hour of 2:00 p.m. in Room C-169 of the U.S. Courthouse located at 1929 Stout Street, Denver, Colorado.

Dated at Denver, Colorado, this day of: January 10, 2000

BY THE COURT:

O. Edward Schlatter
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Senior Judge Zita L. Weinshienk

Civil Action No. 95-Z-777

ELLER INDUSTRIES, INC.,
Plaintiff,

V.

INDIAN MOTORCYCLE MANUFACTURING, INC.,
Defendant. :.

V.

UNITED STATES OF AMERICA,
Intervenor.

AMENDED ORDER

The matter before the Court is the United States' Motion For Reconsideration By District Court Of Order Regarding Receiver's Motion For Determination Regarding Federal Taxes, filed January 25, 2000. On January 10, 2000, Magistrate Judge 0. Edward Schlatter overruled the objections of the United States with regard to the assertion of this Court's jurisdiction over the Receiver's Motion For Determination Of Taxes, filed October 29, *1 999,* and ordered that the United States respond to the merits of the Receiver's motion. The Magistrate Judge also scheduled a hearing for the matter, which was stayed while the Court dealt with this motion.

The issue before the Court involves the tax liability of three debtors in bankruptcy who were involved in Chapter 7 actions in the United States Bankruptcy Court for the District of Massachusetts. The Massachusetts Bankruptcy Court appointed a Trustee in Bankruptcy (Trustee) for the debtor estates. Defendant Indian Motorcycle Manufacturing, Inc. has been placed in a receivership by this Court, and the Court has appointed Sterling Consulting Corporation as Receiver. Under a Joint Motion For Approval Of Stipulation Regarding Coordinated Sale And Coordinated Administration, approved by the Massachusetts Bankruptcy Court on January 1 9, 1 996, the assets of the receivership estate and the bankruptcy estates were combined for sale, and the net proceeds were allocated to the receivership estate.

The United States of America's motion to intervene in the main receivership action was filed on July 6, 1997, and granted on July 9, 1997. On October 29, 1999, the Trustee filed federal ncome tax returns for the years 1993-1998 in the Massachusetts Bankruptcy Court, along with a request under 28 U.S.C. § 505(b) for a prompt determination of federal tax liability. The United States acknowledges that the debtors' 1999 tax returns have been posted on the Receiver's web site, but believes that the Trustee has neither filed them with the Internal Revenue Service nor requested a 505(b) determination on them. Also on October 29, 1999, the Receiver filed in this Court the Receiver's Motion For Determination Of Taxes, requesting that the 1993-1999 tax returns be accepted as filed and that the Trustee, the Receiver, and their respective estates and successors be discharged from any liability therefore.

The United States opposed the order on the grounds of lack of subject matter jurisdiction n this Court, and did not respond on the merits. On December 31, 1999, in accordance with an order of the Massachusetts Bankruptcy Court, the Trustee transferred to the Receiver $1 .2 million to be held by

the Receiver pending a determination of any federal tax liability the Trustee may have had. An estimated $431 ,009 will inure to the benefit of the receivership estate if no taxes are owed. On January 10, 2000, the Magistrate Judge overruled the United States' objections to Receiver's Motion For Determination Of Taxes, ordered the United States to respond to the merits by January 20, 2000, and scheduled a hearing on the merits for February 24, 2000. The United States filed this appeal, thus staying the hearing.

The United States claims that the Court lacks subject matter jurisdiction over the tax liability of the bankruptcy estate. The United States argues three theories showing the Court acks subject matterjurisdiction. First, under 28 U.S.C. § 2201(a), taxpayers generally are barred
from seeking declaratory judgments as to tax liability. Declaratory judgments are permitted under I I U.S.C. § 505, but only in a bankruptcy court. Second, the resolution of tax liabilities does not affect the res of the receivership estate. Third, the United States has not waived its sovereign immunity, and thus is not subject to the jurisdiction of this Court in this matter.

The Receiver has adequately rebutted these points. The United States' focus on declaratory judgments is misplaced. Here, the Court has jurisdiction over all matters that affect the receivership estate. In United States v. labor, 943 F.2d 335, 341 (3° Cir. 1991), the Third Circuit noted "that the appointment of a receiver of a debtor's property by a federal court, confers upon the court federal jurisdiction to decide all questions incident to the preservation, collection and distribution of assets whether such questions are raised in the original suit or ancillary proceedings." (citing Riehie v Margolies, 279 U.S. 218, 223, 49 S.Ct. 310, 312, 73 L.Ed. 669 (1929)). Furthermore, the Court has original, albeit not exclusive, jurisdiction to hear any matter
that would be proper in a bankruptcy court. 28 U.S.C.

1334(a) and (b). Finally, when the United States chose to intervene, it assumed the status of a full participant in the case, and thus is vulnerable to complete adjudication by the Court of the issues in litigation. United States v.

Oregon , 657 F.2d 1009, 1014 (9' Cir. 1982).

The United States had the chance to argue against the transfer of funds in front of Judge Henry J. Boroff of the Massachusetts Bankruptcy Court. He ruled against the United States, explaining that it appeared that both Courts had jurisdiction over the matter, and he was satisfied to have this Court resolve the matter.

As questions ofjurisdiction are dispositive issues, the Court will treat the Magistrate Judge's order as a recommendation under 28 U.S.C. § 636(b)(1)(B), and the United States' motion for reconsideration as an objection under 28 U.S.C. § 636(b)(1)(C). After reviewing the Magistrate Judge's recommendation, Intervenor United States' objection, and the Receiver's response, the Court determines that the Magistrate Judge's recommendation is correct.

However, this Order involves a controlling question of law, namely the Court's jurisdiction over the United States and its determinations of tax liabilities for entities within the receivership estate, as to which there is substantial ground for difference of opinion. As an immediate appeal from this Order would advance the ultimate termination of the case, the Court finds that the conditions of 28 U.S.C. § 1292(b) are met, and the parties may appeal this Order to the Tenth Circuit. Accordingly, it is

ORDERED that Magistrate Judge O. Edward Schlatter's Order Regarding Receiver's Motion For Determination Regarding Federal Taxes will be treated as a recommendation under 28 U.S.C. § 636(b)(1)(B). It is

FURTHER ORDERED that Intervenor United States ofAmerica's Motion For Reconsideration By District Court Of Order Regarding Receiver's Motion For Determination Regarding Federal Taxes will be treated as an objection to the Magistrate Judge's recommendation under 28 U.S.C. § 636(b)(1)(C). It is

FURTHER ORDERED that the Magistrate Judge's recommendation is adopted and approved. It is

FURTHER ORDERED that the Court finds this issue is ripe for an appeal under 28 U.S.C. § 1292(b). It is

FURTHER ORDERED that Intervenor United States of America shall appear before the Magistrate Judge at a hearing on Receiver's motion on March 29, 2000 at 2:00 p.m. in Room C-169 at the United States Courthouse, 1929 Stout Street, Denver, Colorado.

Dated at Denver, Colorado, this 17 day of July, 2000, *nunc pro tunc* March 1 6, 2000.

BY THE COURT
ZITA L. WEINSHIENK,
Senior Judge United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Senior Judge Zita L. Weinshienk

Civil Action No. 95-Z-777

ELLER INDUSTRIES, INC.,
Plaintiff,

V.

INDIAN MOTORCYCLE MANUFACTURING, INC.,
Defendant.

V.

UNITED STATES OF AMERICA,
Intervenor.

ORDER

The matter before the Court is the United States' Motion For Reconsideration By District Court Of Order Regarding Receiver's Motion For Determination Regarding Federal Taxes, filed January 25, 2000. On January 1 0, 2000, Magistrate Judge 0. Edward Schlatter overruled the objections of the United States with regard to the assertion of this Court's jurisdiction over the Receiver's Motion For Determination Of Taxes, filed October 29, 1 999, and ordered that the United States respond to the merits of the Receiver's motion. The Magistrate Judge also scheduled a hearing for the matter, which was stayed while the Court dealt with this motion.

The issue before the Court involves the tax liability of three debtors in bankruptcy who were involved in Chapter 7 actions in the United States Bankruptcy Court for the District of Massachusetts. The Massachusetts Bankruptcy Court appointed a Trustee in Bankruptcy (Trustee) for the debtor estates. Defendant Indian Motorcycle Manufacturing, Inc. has been placed in a receivership by this Court, and the Court has appointed Sterling Consulting Corporation as Receiver. Under a Joint Motion For Approval Of Stipulation Regarding Coordinated Sale And Coordinated Administration , approved by the Massachusetts Bankruptcy Court on January *1 9, 1 996,* the assets of the receivership estate and the bankruptcy estates were combined for sale, and the net proceeds were allocated to the receivership estate.

The United States of America's motion to intervene in the main receivership action was filed on July 6, *1997,* and granted on July 9, *1997.* On October 29, *1999,* the Trustee filed federal income tax returns for the years 1993-1998 in the Massachusetts Bankruptcy Court, along with a request under 28 U.S.C. § 505(b) for a prompt determination of federal tax liability. The United States acknowledges that the debtors' I 999 tax returns have been posted on the Receiver's web site, but believes that the Trustee has neither filed them with the Internal Revenue Service nor requested a 505(b) determination on them. Also on October 29, *1999,* the Receiver filed in this Court the Receiver's Motion For Determination Of Taxes, requesting that the 1993-1999 tax returns be accepted as filed and that the Trustee, the Receiver, and their respective estates and successors be discharged from any liability therefore.

The United States opposed the order on the grounds of lack of subject matter

Jurisdiction in this Court, and did not respond on the merits. On December 31, *1999,* in accordance with an order of the

Massachusetts Bankruptcy Court, the Trustee transferred to the Receiver $1 .2 million to be held by the Receiver pending a determination of any federal tax liability the Trustee may have had. An estimated $431,009 will inure to the benefit of the receivership estate if no taxes are owed. On January 1 0, 2000, the Magistrate Judge overruled the United States' objections to Receiver's Motion For Determination Of Taxes, ordered the United States to respond to the merits by January 20, 2000, and scheduled a hearing on the merits for February 24, 2000. The United States filed this appeal, thus staying the hearing.

The United States claims that the Court lacks subject matter jurisdiction over the tax liability of the bankruptcy estate. The United States argues three theories showing the Court lacks subject matter jurisdiction. First, under 28 U.S.C. § 2201(a), taxpayers generally are barred from seeking declaratory judgments as to tax liability. Declaratory judgments are permitted under II U.S.C. § 505, but only in a bankruptcy court. Second, the resolution of tax liabilities does not affect the res of the receivership estate. Third, the United States has not waived its sovereign immunity, and thus is not subject to the jurisdiction of this Court in this matter.

The Receiver has adequately rebutted these points. The United States' focus on declaratory judgments is misplaced. Here, the Court has jurisdiction over all matters that affect the receivership estate. In United States v. I Tabor, 943 F.2d 335, 341 (3' Cir. 1991), the Third Circuit noted "that the appointment of a receiver of a debtor's property by a federal court, confers upon the court federal jurisdiction to decide all questions incident to the preservation, collection and distribution of assets whether such questions are raised in the original suit or ancillary proceedings." (citing Kiehie v. Margolies, 279 U.S. 218, 223, 49 S.Ct. 310, 312, 73 L.Ed. 669 (1929)). Furthermore, the Court has original, albeit not exclusive, jurisdiction to hear any matter that would be

proper in a bankruptcy court. 28 U.S.C. 1334(a) and (b). Finally, when the United States chose to intervene, it assumed the status of a full participant in the case, and thus is vulnerable to complete adjudication by the Court of the issues in litigation. United States v. Oregon 657 F.2d 1009, 1014 (91 Cir. 1982).

The United States had the chance to argue against the transfer of funds in front of Judge Henry J. Boroff of the Massachusetts Bankruptcy Court. He ruled against the United States, explaining that it appeared that both Courts had jurisdiction over the matter, and he was satisfied to have this Court resolve the matter.

As questions of jurisdiction are dispositive issues, the Court will treat the Magistrate Judge's order as a recommendation under 28 U.S.C. § 636(b)(1)(B), and the United States' motion for reconsideration as an objection under 28 U.S.C. § 636(b)(1)(C). After reviewing the Magistrate Judge's recommendation, Intervenor United States' objection, and the Receiver's
response, the Court determines that the Magistrate Judge's recommendation is correct. Accordingly, it is

ORDERED that Magistrate Judge 0. Edward Schlatter's Order Regarding Receiver's Motion For Determination Regarding Federal Taxes will be treated as a recommendation under 28 U.S.C. § 636(b)(1)(B). It is

FURTHER ORDERED that Intervenor United States of America's Motion For Reconsideration By District Court Of Order Regarding Receiver's Motion For Determination Regarding Federal Taxes will be treated as an objection to the Magistrate Judge's recommendation under 28 U.S.C. § 636(b)(1)(C). It is

FURTHER ORDERED that the Magistrate Judge's

recommendation is adopted and approved. It is

FURTHER ORDERED that Intervenor United States of America shall appear before the Magistrate Judge at a hearing on Receiver's motion on March 29, 2000 at 2:00 p.m. in Room *C-169* at the United States Courthouse, 1929 Stout Street, Denver, Colorado.

Dated at Denver, Colorado, this 15th day of March, 2000.

BY THE COURT:
ZITA L. WEINSHIENK,
Senior Judge United States District Court

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

26 U.S.C. § 7421 (a) provides:

> Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246 (b), 6331(i), 6672(b), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any persons, whether or not such person is the person against whom such tax was assessed.

28 U.S.C. § 959 (a) provides:

> Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

28 U.S.C. § 2201(a) provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding

under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(3)

Supreme Court
FILED
DEC 19 2001

No. 01-694

In the Supreme Court of the United States

STERLING CONSULTING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1712

QUESTION PRESENTED

Whether the Declaratory Judgment Act, 28 U.S.C. 2201, and the Anti-Injunction Act, 26 U.S.C. 7421, preclude the district court in a receivership proceeding from enjoining the Internal Revenue Service from making tax determinations within the time periods permitted by applicable law and permit the district court to determine tax liabilities outside of that statutory framework.

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In the Supreme Court of the United States

No. 01-694

STERLING CONSULTING CORPORATION, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-11a) is reported at 245 F.3d 1161. The orders of the district court (Pet. App. 12a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2001. A petition for rehearing and rehearing en banc was denied on August 7, 2001. The petition for a writ of certiorari was filed on November 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1995, Eller Industries, Inc., a Colorado corporation, brought this receivership action in the

United States District Court for the District of Colorado against Indian Motorcycle Manufacturing, Inc. (IMMI), a New Mexico corporation. The district court appointed petitioner as the receiver. IMMI was one of several companies embroiled in a dispute over the "Indian Motorcycle" trademark. Three other unrelated companies involved in the dispute, Indian Motocycle Company, Inc., Indian Motocycle Apparel & Accessories, Inc., and Indian Motocycle Manufacturing, Inc. (hereinafter referred to as the debtor corporations), have been in bankruptcy in Massachusetts since before 1995. Pet. App. 2a-3a.

In late 1995, petitioner, acting as receiver for IMMI, acquired all of the stock of the three debtor corporations and another corporation, Indian Motor Company (Motor), from Michael Mandelman. In 1997, the United States intervened in this action to enforce federal tax liens for individual income taxes owed by Mandelman against a forthcoming distribution to Michelle Lean, whom the United States contended was Mandelman's nominee. In 1999, the assets of the receivership estate of IMMI and the bankruptcy estates of the debtor corporations were jointly sold, and $3.5 million of the proceeds from the sale was allocated to the bankruptcy estates. Pet. App. 3a.

2. In October 1999, petitioner filed a motion with the district court in Colorado asking that court to determine that the debtor corporations owed no additional federal taxes above those shown on their tax returns for 1999. The government opposed the motion on the ground that the district court in Colorado lacked jurisdiction to determine the tax liabilities of debtors that were in bankruptcy in Massachusetts. Pet. App. 3a.

3. In December 1999, the bankruptcy trustee for the debtor corporations' bankruptcy estates filed an emergency motion in the Massachusetts Bankruptcy Court seeking approval of his final accounts and distribution of the estates. The government objected to the motion and distribution. During the hearing on the motion, the government indicated that the tax liabilities of the three debtor corporations for 1999 would amount to $1.2 million if the top corporate tax rate was applied to the $3.5 million allocated to the bankruptcy estates from the sale of the combined estates. It further indicated that the escrow of $437,000 proposed by petitioner and the bankruptcy trustee to cover the potential tax liabilities of the debtor corporations was insufficient. Pet. App. 3a-4a.

The bankruptcy court entered an order approving the trustee's amended final accounts. In its order, the bankruptcy court purported to "cede jurisdiction of the determination of the Bankruptcy Estates [sic] tax liabilities to the [district court in Colorado]." Pet. App. 4a. The bankruptcy court ordered that $1.2 million be disbursed from the bankruptcy estates to petitioner as "escrow agent" and that petitioner hold the money for the purpose of covering the potential 1999 tax liabilities of the debtors and distributing the balance to bankruptcy creditors. *Ibid.*

The government appealed the bankruptcy court's order to the Bankruptcy Appellate Panel for the First Circuit. Pet. App. 4a. The Bankruptcy Appellate Panel held that the bankruptcy court erred in ceding jurisdiction to the federal district court in Colorado, and reversed the bankruptcy court's order that distributed the $1.2 million to petitioner as escrow agent and capped the debtors' tax liabilities at $1.2 million.

United States v. *Sterling Consulting Corp. (In re Indian Motocycle Co.)*, 261 B.R. 800 (BAP 1st Cir. 2001).

4. In the meantime, petitioner's motion in the Colorado district court regarding the debtor-corporations' 1999 income tax liabilities was referred to a magistrate judge. In January 2000, the magistrate overruled the government's jurisdictional objections and ordered the government to respond to the merits of petitioner's motion. On March 20, 2000, the district court adopted the magistrate's report and held that its jurisdiction over all matters affecting the receivership estate included the jurisdiction to determine the tax liabilities of the debtor corporations. The court further ruled that it had jurisdiction to determine those liabilities under 28 U.S.C. 1334(a), which confers upon the district courts "original and exclusive jurisdiction of all cases under title 11," and 28 U.S.C. 1334(b), which confers upon the district courts "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Pet. App. 4a.

Petitioner filed a motion in the Colorado district court asking it to determine that IMMI and Motor owed no additional federal taxes beyond the amount set forth in their tax returns for certain years. The government opposed the motion on jurisdictional grounds, but the magistrate determined that the court had jurisdiction to determine IMMI's and Motor's tax liabilities. The magistrate ordered the IRS to address the merits of IMMI's and Motor's tax returns by August 31, 2000, and to address the merits of the 1999 tax returns for the debtor corporations by July 1, 2000. The magistrate further ordered that, in the event the IRS failed to comply with the court's order, "the [tax] returns shall be deemed to have been completed correctly, and the estates shall be deemed to owe no further taxes." The

government objected to the magistrate's order. Pet. App. 5a.

5. On July 19, 2000, the district court overruled the government's objections and affirmed the magistrate's order. It extended until August 31, 2000, however, the deadline by which the IRS was to address the merits of the debtor corporations' tax liabilities. In its order, the district court stated that whether it had jurisdiction over the tax liability determinations for entities within the receivership estate was a controlling question of law as to which there was substantial ground for a difference of opinion.[1] In a separate order entered the same day, the district court also certified the question whether it had the authority to set enforceable deadlines for such tax determinations. The court concluded that an immediate appeal of these questions would advance the ultimate termination of the case, thereby satisfying the conditions of 28 U.S.C. 1292(b). Pet. App. 5a.

6. The United States petitioned the Tenth Circuit for interlocutory review. The court of appeals granted the petition and stayed the district court orders pending appeal. Pet. App. 5a.

On the merits, the court of appeals held that the Declaratory Judgment Act, 28 U.S.C. 2201(a), prohibits the district court from determining corporate tax liabilities in a receivership action. The court of appeals further held that the Anti-Injunction Act, 26 U.S.C. 7421, bars the district court from enjoining the IRS from assessing and collecting taxes for failure to evaluate tax returns by the deadline imposed by the district court in this case. Pet. App. 2a.

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[1] The district court appeared to include the three debtor corporations and Motor in its reference to the "receivership estate."

With respect to the determination of tax liabilities, the court of appeals noted that the Declaratory Judgment Act empowers courts to "declare the rights and other legal relations of any interested party seeking such a declaration." 28 U.S.C. 2201(a). That grant of authority, however, explicitly excludes cases "with respect to Federal taxes." *Ibid.* The court therefore concluded (Pet. App. 6a-7a) (citation omitted):

> In its motions to the district court regarding the tax liabilities of the five corporations, the receiver requests relief that the Declaratory Judgment Act specifically prohibits the court from granting. Absent the application of an exception to the statutory prohibition, the Declaratory Judgment Act plainly bars the district court from declaring that the corporations in question owe no additional federal taxes. To hold otherwise would impede the government's ability to assess and collect taxes.

The court of appeals also concluded that the injunction entered by the district court to prohibit the IRS from determining the tax liabilities of the five corporations after the court-imposed deadline was an improper attempt to enjoin the IRS from assessing and collecting taxes. The Anti-Injunction Act expressly provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. 7421(a). The court therefore concluded that the district court lacked jurisdiction to enjoin the IRS from assessing and collecting taxes for failure to expedite its determination of taxes in this case. Pet. App. 9a-10a.

Petitioner filed a petition for rehearing and for rehearing en banc. The petition was denied. Because

the appeal was interlocutory under 28 U.S.C. 1292(b), the proceedings in the district court have continued, as have those in the Massachusetts bankruptcy court on remand from the BAP judgment.[2]

ARGUMENT

The court of appeals held that the Declaratory Judgment Act bars the district court from determining that IMMI, Motor, and the debtor corporations owe no federal income taxes in excess of the amounts shown on their tax returns, and that the Anti-Injunction Act bars the district court from enjoining the IRS from assessing additional taxes against those corporations. The petition seeks review of the decision below only insofar as it relates to the tax liabilities of IMMI, the only corporation that is in receivership. Pet. 20 n. 14. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 7) that the decision of the court of appeals violates the constitutional separation of powers by allowing the executive branch to impinge on the function of the judiciary. In making this assertion, petitioner claims that the court of appeals impermissibly curtailed the district court's inherent powers in receivership actions.

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[2] Petitioner has filed a request under 26 U.S.C. 6501(d) for an expedited examination of IMMI's and Motor's tax returns. Petitioner was recently provided by government counsel with a nearly completed draft examination report prepared by the revenue agent, proposing to assess more than $2 million in taxes against IMMI for the fiscal year ended September 30, 1999, and was invited to indicate any factual errors in the report before the assessment is made.

"Under settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued." *United States* v. *Dalm*, 494 U.S. 596, 608 (1990) (internal quotation marks and citations omitted). The Court has "frequently held" that a waiver of sovereign immunity must be "unequivocally expressed in the statutory text" and that any such waiver "is to be strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (citing cases). As the court of appeals observed, in enacting the Internal Revenue Code, Congress established a well-defined and circumscribed framework for the determination, and judicial review, of federal tax liabilities.[3] There is

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[3] See 26 U.S.C. 6201 (Congress has "authorized and required" the IRS to conduct examinations of tax liabilities), 6501(a) (IRS generally has three years from the date the taxpayer files a return to conduct an examination), 6212 (once the IRS determines an income tax deficiency, it is authorized to issue a notice of deficiency to the taxpayer), 6213 (taxpayer thereafter has 90 days in which to file a petition in the Tax Court and obtain a judicial review of its tax liability without having to pay any portion of the liability), 7422(a) (if the taxpayer fails to seek review in the Tax Court, then it may obtain a judicial review of its liabilities, after paying the tax in full, by filing an administrative claim for refund and filing a refund suit), 6532(a)(1) (refund suit may not be filed until the expiration of six months from the date of filing of the refund claim, unless the taxpayer has received a notice of disallowance before that time).

Moreover, Congress has enacted special rules that pertain to corporations in receivership. For example, Congress has provided that the IRS may immediately assess a tax liability against a taxpayer in receivership, even if a notice of deficiency has not been issued to the taxpayer, and that the IRS may file claims against taxpayers in receivership proceedings "for adjudication in accordance with law." 26 U.S.C. 6871(a), (c). Further, Congress has provided that if a dissolving corporation (including a corpora-

no express waiver of sovereign immunity in any statutory text that would confer upon the district court the authority to require the IRS to submit in this receivership proceeding a claim for the tax liabilities of certain corporations or be forever barred from asserting liabilities against them. And, as the court of appeals correctly held, the Declaratory Judgment and Anti-Injunction Acts expressly bar the relief that petitioner has sought. Pet. App. 6a-9a.

Petitioner incorrectly asserts (Pet. 10) that, by intervening in the receivership—an *in rem* proceeding —the government "intervened for all purposes related to the *res* and waived sovereign immunity for all purposes related to the *res*." This is the same argument that the Eighth Circuit recently characterized as a "broad overstatement [that] is seriously misleading." *Miller* v. *Tony & Susan Alamo Foundation*, 134 F.3d 910, 916 (8th Cir. 1998). When the United States intervenes in a suit, sovereign immunity still shields it from cross-claims and counterclaims, except in recoupment. In *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868), on which petitioner relies (Pet. 10 n.4), the Court made a distinction between *in personam* and *in rem* proceedings:

> [W]hen the United States institute a suit, they waive their exemption [from suit] so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled. They then stand in

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tion in receivership) files an appropriate request in writing, the IRS is to make an assessment of the corporation's tax liability within 18 months after receiving the request. 26 U.S.C. 6501(d).

> such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy.

Here, the United States did not intervene to assert a claim to the receivership corpus generally. Instead, the United States appeared only to enforce its tax lien against distributions to Michelle Lean, as the alleged nominee of Michael Mandelman. By reason of this intervention, the government must respond to arguments by other creditors that their claims to distributions payable *to Mandelman* are superior to the rights of the government. See *Carr* v. *United States*, 98 U.S. 433, 438 (1878) ("when the government itself seeks its rights at the hands of the court, equity requires that the rights of other parties interested in the subject matter should be protected"). By making such a claim, however, the government did not waive its sovereign immunity with respect to the determinations of the tax liabilities of the several corporations in question.

Petitioner also erroneously relies (Pet. 13-15) on the statement in *Riehle* v. *Margolies*, 279 U.S. 218, 223 (1929), that "[t]he appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection and distribution of the assets." See also *Wabash Railroad* v. *Adelbert College*, 208 U.S. 38, 54 (1908) (quoted to similar effect at Pet. 15). But *Riehle* and *Wabash R.R.* did not involve claims against the federal government, and a waiver of sovereign immunity was thus not required. Moreover, those cases did not involve (and, in fact, predated) the

tax exception to the Declaratory Judgment Act. Regardless of the scope of federal court jurisdiction in receivership proceedings as a general matter, *Riehle* and *Wabash Railroad* thus do not establish jurisdiction in the district courts to truncate the statutory period for examining tax liabilities or to determine the tax liabilities of the corporations in this case.

Petitioner argues (Pet. 21) that the legislative history of the Declaratory Judgment Act does not indicate that the tax exception to that Act was intended to limit the broad powers of the courts in receivership proceedings. Petitioner asserts that, in the absence of an express reference to receivership proceedings, the tax exception to the Declaratory Judgment Act should not be given its ordinary meaning as applied to such proceedings. This argument is premised on the assumption that the general power of a receivership court would permit it to resolve tax matters that are beyond the subject of the government's intervention. As we have demonstrated, that assumption is incorrect. Because there is no waiver of sovereign immunity exposing the government to such broad relief, there was no reason for Congress in enacting the tax exception to make a point of clarifying that such broad relief would henceforth not be available. Moreover, the language of the tax exception that precludes the broad relief petitioner sought here is sufficiently clear that recourse to the legislative history is neither necessary nor appropriate. See *Burlington Northern R.R. Co.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) ("[u]nless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete'") (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). See also *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (plain statutory

language is conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters").

Contrary to petitioner's assertion (Pet. 12 n.6), the decision of the Eighth Circuit in *United States* v. *Middle States Oil Corp.*, 18 F.2d 231 (1927), does not contradict this conclusion. That decision did not address the effect of sovereign immunity on a receivership case, and it predates the tax exception to the Declaratory Judgment Act. In short, we are aware of no decision that holds that the tax exception to the Declaratory Judgment Act does not apply in receivership proceedings, and petitioner has not cited any such case.

2. Petitioner contends (Pet. 24) that judicially-created exceptions to the Declaratory Judgment Act should apply to this case. Petitioner did not, however, raise this argument in the court of appeals, and it was not addressed in the opinion. "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (quoting *Duignan* v. *United States*, 274 U.S. 195, 200 (1927)). This is not such a case and, in any event, the argument lacks merit.

The authorities cited by petitioner involve the Anti-Injunction Act, not the Declaratory Judgment Act. The principal authority on which petitioner relies—*Bob Jones University* v. *Simon*, 416 U.S. 725 (1974)—recognized that "[o]nly upon proof of the presence of two factors could the literal terms of § 7421(a) be avoided: first, irreparable injury, the essential prerequisite for injunctive relief in any case; and second, certainty of success on the merits." 416 U.S. at 737 (citing *Enochs*

v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962)). Under this standard, an injunction may issue only "if it is clear that under no circumstances could the Government ultimately prevail * * * ." *Ibid.* "Only if it is * * * apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." *Ibid.*

In this case, petitioner does not show that irreparable injury would result from the determination of the relevant tax liabilities through the usual procedures provided by law. Nor is there any indication that the government could not prevail upon the merits in the ultimate determination of any such liabilities. There is thus no basis for petitioner's assertion that injunctive relief to bar the ordinary determination and assessment of these liabilities could be warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2001

FILED

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OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

STERLING CONSULTING CORPORATION,
a Colorado corporation, as receiver for the
Indian Motorcycle Manufacturing Inc.,
a New Mexico corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENTAL APPENDIX FOR WRIT OF CERTIORARI

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13 pp

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 95-Z-777

ELLER INDUSTRIES, INC.
Plaintiff,

v.

INDIAN MOTORCYCLE MANUFACTURING, INC.,
a New Mexico Corporation,
Defendant,

v.

UNITED STATES OF AMERICA, on behalf of
THE INTERNAL REVENUE SERVICE,
Intervenor.

Filed June 6, 1997

UNITED STATES OF AMERICA'S MOTION TO
INTERVENE PURSUANT TO RULE 24, FED. R. CIV. P

The United States of America, by and through its undersigned attorneys, Henry L. Solano, United States Attorney for the District of Colorado, William G. Phara, Assistant United States Attorney and Susan A. Berson, Senior Trial Attorney, United States Department of Justice, Washington, D.C., on behalf of its agency the Internal Revenue Service, hereby moves for an Order from this Court permitting it to intervene in this action pursuant to Rule 24, Fed.R.Civ.P. In support, the United States shows the Court as follows, and also refers the Court to its Opposition to the parties Motion for Order Authorizing Settlement with Michelle Marie Lean, and Declaration of Revenue Officer

Joyce Peneau And Accompanying Government Exhibits 1 through 18, simultaneously filed herewith.

1. The present Motion was filed by the receiver in this proceeding apparently as a result of a dispute as to whether Ms. Michelle Marie Lean has an interest in the assets of Michael Mandelman. Mr. Mandelman through his business, Mandelman Group, has an ownership interest in the defendant, Indian Motorcycle Manufacturing. Motion, ¶3, 4, and 6. The Motion seeks approval from this Court of disbursements to Ms. Lean in amounts equal to (1) 2.5% of the equity in a related Mandelman entity referred to as "Combined Estates", (2) an amount of $230,000.00, and (3) 15% of another Mandelman related entity referred to as the "European Corporation" as stated in the Agreement at paragraph 1.

2. Mr. Mandelman owes the United States unpaid tax liabilities in excess of $1,000,000.00. See Declaration of Joyce Peneua, ¶4 [hereinafter "Peneau Declaration"], and Government Exhibits 1 through 15. The Internal Revenue Service has filed Notices of Federal Tax Lien against Mr. Mandeltuan for the taxable years 1988 through 1993. Set Government Exhibits 1 through 15.

3. Mr. Mandelman has used Ms. Lean to hide his assets from his creditors, *including* the Internal Revenue Service. Peneau Declaration, *¶'s 6, 7,* and 8.

4. While Ms. Lean claims to be a former business associate of Mr. Mandelman's and have an equity interest in some of Mr. Mandelman's business holdings, Motion, ¶4, this is directly contrary to Ms. Lean's financial statement as of July 30, 1996, marked as Government Exhibit 17. See also Peneau Declaration. ¶'s 8, 9, 11 and 12. On the financial statement, Ms. Lean lists only a loan receivable made to Mandelman in the amount of $20,000.00 in Australian

dollars. Now, by the Motion, she seeks more than $200,000.00 for an undocumented $20,000.00 loan receivable. Thus, it appears that either Mr. Mandelman is continuing to use Ms. Lean to transfer assets to himself indirectly in an attempt to evade the payment of his tax liability, Peneau Declaration, ¶'s 11 and 12, or Ms. Lean it attempting to obtain a large return on her undocumented $20,000.00 loan.

5. In accordance with Rule 24, Fed.R.Civ.P., upon good *cause shown,* the Court may permit intervention (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Set also Hallco Mfg., Co. v. Quaeck, 16 F.R.D., 98, 101 CD. Or. 1995) (which addresses the similar *provisions* of Rule 24, and quotes Sierra Club v. United States Envtl. Protection Agency, 995 F.2d. 1478, 1461 (9th Cir. 1993)); Yorkshire v. United States, 26 F. 3d 942, 944 (9th Cir. ((citation omitted), cert. Denied sub nom., S.P Co. v. Yorkshire, 115 S.Ct. 487 (1994)

6. The rules "interest" requirement obligates the United States to prove that it has a "significantly protectable" interest in the property at issue in this litigation. The United States has satisfied this prerequisite. The Notices of Federal Tax Lien marked as Government Exhibits 1 through 16, and the Declaration *of* Joyce Perteau establish Mr. Mandelman has an unpaid. tax liability to which the federal tax lien has attached to all Mr. Mandelman's property arid rights to property under Sections 6321, 6322, and 6331 of the Internal Revenue Code. See also United States v. City of New Britain, 347 U.S. 81 (1954)

7. The United States must intervene in this action since it is not adequately represented by the parties. The interests of no party match the United States in collecting Mr. Mandelman's tax debt. Based on the Motion filed by the parties for an Order Approving the Settlement with Michelle Marie Lean, it appears that either Mr. Mandelman is once again attempting to use Ms. Lean to hide assets and evade the payment of his tax liability, or Ms. Lean is attempting to profit at the expense of the United States.

8. The United States does not believe that Ms. Lean has provided evidence of a valid interest in the defendant's property to this Court. The Letter of Agreement referenced by the Motion is insufficient to refute the financial statement provided by Ms. Lean to the IRS, and the IRS investigation of Mr. Mandelman's concealment of assets. Nevertheless, to the extent this Court determines Ms. Lean has an interest, if any, in the defendant or Mr. Mandelman's businesses, the United States' federal tax lien is superior to Ms. Lean's claim pursuant to Sections 6321, 6322, and 6331 of the Internal Revenue Code. As a consequence, the United States' interest would suffer detrimentally if distributions were made to Ms. Lean as proposed by the Settlement Agreement between Michelle Marie Lean and the Receiver. Thus, the United States should be allowed to intervene in this action to protect its interest pursuant to Rule 24, Fed.R.Civ.P.

9. A [proposed] Order has been submitted with this Motion. WHEREFORE, the United States of America, on behalf of the Internal Revenue Set-vice, hereby respectfully requests that it be allowed to intervene in this action to protect its legally recognizable interest in the assets of the defendant, as a related entity of Michael Mandelman and the Mandelman Group.

Dated this 4th day of June 1997.

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UNITED STATES OF AMERICA, on behalf of
THE INTERNAL REVENUE SERVICE,
Intervenor.

Filed June 9, 1997

ORDER GRANTING UNITED STATES'
MOTION TO INTERVENE

This matter came before the Court upon the United States of America's Motion to Intervene pursuant to Rule 24, Fed.R.Civ.P. After reviewing the pleadings and for good cause being shown, it is hereby,

ORDERED that the United States of America's Motion to Intervene is granted.

DATED THIS 9th day of June, 1997

BY THE COURT:
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 95-Z-777

INDIAN MOTORCYCLE MANUFACTURING, INC.,
a New Mexico Corporation,
Defendant,

v.

UNITED STATES OF AMERICA, on behalf of
THE INTERNAL REVENUE SERVICE,
Intervenor.

Filed February 20, 2001

NOTICE OF TRUSTEE'S STATUS REPORT FILED WITH THE MASSACHUSETTS BANKRUPTCY COURT

Sterling Consulting Corporation, as receiver, hereby provides notice that Stephan M. Rodolakis, Esquire, the acting Chapter 7 bankruptcy trustee (the "Trustee") in the actions known as *In Re: Indian Motocycle Company, Inc., In Re: Indian Motocycle Manufacturing Company, Inc., and In Re: Indian Motocycle Apparel Company, Inc.*, Cases No. 93-41354 - HJB, 94-42288-HJB, 93-41955-}{JE filed his Trustee's Status Report with the Massachusetts Bankruptcy Court on February 13, 2001. A copy of the Trustee's Status Report is attached to this Notice.

Dated this 20th day of February, 2001
Respectfully submitted,

Sterling Consulting Corporation,
As Receiver,
By Richard A. Block, President

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

Bankruptcy Nos. 93-41954-HJB, 93-41955-HJB,
94-42288-HJB (administratively consolidated)

In re:
INDIAN MOTOCYCLE CO., INC.,
Debtor

INDIAN MOTOCYCLE APPAREL AND ACCESSORIES CO., INC.,
Debtor

INDIAN MOTOCYCLE MANUFACTURING CO., INC.,
Debtor

Filed February 13, 2001

TRUSTEE'S STATUS REPORT

Chapter 7 Trustee Stephan M. Rodolakis (the "Trustee") provides this Court and the parties in interest in this matter with the following status report.

As all parties undoubtedly recall, the assets of the above Debtors were combined, for purposes of sale, with the assets of that receivership action in the Federal District Court for the District of Colorado styled *Filer Industries, Inc.*, v, *Indian Motorcycle Manufacturing, Inc.*, Docket Number 95-Z-777 (the "Receivership" and the "Coordinated Sale"). The Coordinated Sale agreement was reached after contentious litigation between the Receiver and the Trustee's predecessor. Thereafter, the assets of the combined estates were marketed. Suitors came and went. Eventually, IMCOA Licensing America, Inc., ("IMCOA") submitted an offer which was accepted This Court and the Receivership Court

both approved sale of the assets of the combined estates to IMCOA. The sale approval process was complicated somewhat by a disagreement which had arisen between the Trustee and the Receiver as to the allocation of sales proceeds. To avoid losing the sale, the parties agreed upon the delivery of $3,500,000.00 of sale proceeds to the Trustee, subject to claims by the Receiver for return of any amounts to which the Receiver was entitled. This Court approved that arrangement and the sale closed in February of 1999. After the sale had closed, the Trustee and the Receiver engaged in heated litigation over the funds held by the Trustee. Settlement negotiations were excruciating. A settlement in principle was eventually reached. Documenting the agreement was also painstaking and anything but simple. The settlement agreement was eventually approved by both this Court and the Receivership Court. With the settlement approved, the Trustee was able to move forward to filing a final report. On December 30, 1999, this Court approved the Trustee's final report.

Among the terms of the final report approved by this Court was the distribution of $1.2 Million Dollars to the Receiver, to bold as escrow agent for the payment of any tax liabilities of the three debtors. Further, the Receiver (the holder of aft of the stock of the three debtors) undertook the obligation to obtain approval of the Debtors' final tax returns. The $1.2 Million Dollar "escrow" figure was provided by a representative of the Internal Revenue Service, who indicated that this amount was the absolute maximum possible tax liability for the debtors. After the Trustee's Final Report was approved, the Trustee paid all administrative claims in full, made a distribution of approximately 61% to unsecured claims and remitted the remaining $1.2 Million to the Receiver.

The IRS appealed the order approving the Final Reports, and that appeal is pending.

The Receiver filed a motion with the Receivership Court seeking a determination that the Debtors' tax returns were correct and that no taxes were due. The IRS opposed the motion. The Receivership Court issued an order that it would rule on the propriety of the returns and gave the IRS a period of time to interpose substantive objections. The IRS appealed the ruling of the Receivership Court on the basis that the Court had no jurisdiction to determine the propriety of the tax returns. That appeal is pending with the Tenth Circuit Court of Appeals.

Later, the IRS moved for relief from this Court's order approving the Trustee's agreement with the Receiver which limited the amount of funds available to pay Bankruptcy estate claims at *$3.5* Million. Upon denial of its motion, the IRS appealed to the Bankruptcy Appellate Panel. *That* appeal is also currently pending.

The Trustee understands that when the IRS auditor assigned to the Debtors' returns originally reviewed the returns, she made determinations with respect to prior year returns which left it highly unlikely, if not impossible, that any monies would be owed for the final year's return. However, she was apparently subsequently instructed to find problems with the Debtors returns. The transparent reasoning behind this directive is that the IRS does not like the procedure employed by the Trustee and the Receiver to have the returns approved, even though the procedure gave the IRS ample time to interpose substantive objections (which the IRS chose not to do). Armed with an apparently limitless supply of time and taxpayer funds, the IRS is manufacturing a dispute on the merits because it dislikes the procedure employed. Unhampered by the rational litigation philosophy that you do not waste resources contesting substantive matters with which you have no real disputes the IRS persists in remaining the sole impediment to distributing funds to claimants. Claimants in these cases are almost exclusively U.S.

taxpayers who (depending on individual circumstances) would likely be required to pay taxes on their recovery in any event.

The thrust of the argument that the IRS has concocted as the basis for a dispute on the merits of the tax returns (thereby giving the illusion of rationality to the decision to contest the procedure) is that more of the proceeds of the sale of the assets of the combined estates should be allocated to the Debtors. The underlying assumption seems to be that the Trustee and the Receiver conspired to recharacterize sale proceeds which had actually been received by the Debtors as having been paid to the Receiver in order to avoid taxes on the finds received by the Trustee. A rational observer with the benefit of having read the pleadings in this case and in the Receivership proceeding could discern that the fight between the Trustee and the Receiver for sale proceeds was real and intense. It is unclear to the Trustee how a conclusion could be ever be drawn that the sparring between the Trustee and the Receiver over sale proceeds was a conspiratorial charade designed to hide the true economics of the sale from the government.

In any event, until all appeals are resolved, no further distributions may be made.

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Chanter 7 Trustee
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Supreme Court, U.S.
FILED
JAN 8 2002
CLERK

(5)

No. 01-694

In the

Supreme Court of the United States

STERLING CONSULTING CORPORATION,
a Colorado corporation, as receiver for the
Indian Motorcycle Manufacturing Inc.,
a New Mexico corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF

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ARGUMENT

The IRS's response brief, when compared to the 10th Circuit Opinion, perfectly underscores the need for this Court to grant certiorari. In that brief, the IRS does not seriously contend that the 10th Circuit's analyses of the Declaratory Judgment Act and the Tax Injunction Act were correct. Rather, it contends it was protected from the Orders of the District Court by the doctrine of sovereign immunity. This is the issue that was briefed in the District Court and this is the issue that the IRS submitted for review to the 10th Circuit. The sovereign immunity issue was not, however, addressed by the 10th Circuit. Instead, the 10th Circuit engaged in an analysis not briefed by either party, and, unfortunately, reached the wrong result.[1]

Another excellent way to underscore the need for this Court to grant certiorari is to observe the narrow circumstances that give rise to the issue and the importance of maintaining the law in connection with those narrow circumstances. It is not often a separation of powers issue is so clearly laid out for this Court, nor one where the Judicial Branch so clearly invites future transgressions into its exclusive jurisdiction.

This is a case where the IRS voluntarily elected to emerge from the Executive Branch, intervene in an *in rem* case pending before a United States District Court, and ask for relief in connection with the entire *res* of the Receivership Estate. This is not a case where a receiver or the District Court attempted to invade the inactive recesses of the Executive Branch and restrain the assessment of taxes. There is no question that had the IRS not intervened, the District Court would have had no jurisdiction upon which to

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[1]As it discussed more fully below, the 10th Circuit's facial analysis of the Declaratory Judgment Act has been determined by this Court to be wrong. *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-737 (1974) (recognizing two unwritten, judicially created exceptions to the prohibition on declaratory judgments regarding federal taxes) and its progeny (*Elia v. Connet*, 908 F.2d 521, 523, 526 (9th Cir. 1990) (same); *In re State of Cal. v. Regan*, 641 F.2d 721, 722-23 (9th Cir. 1981) (same)).

base its declaratory order. In other words, the holding of the 10th Circuit regarding the Declaratory Judgment Act would have been correct had the IRS not intervened. If left unattended, however, the 10th Circuit decision will invite intervention by the IRS in receiverships (and other *in rem* cases) for limited purposes, thereby allowing the IRS to affect the distribution of assets without filing its claims (*i.e.*, assessing).[2]

The 10th Circuit's error, and yet another reason for this Court to grant certiorari, was partly driven by a record that did not address the Declaratory Judgment Act at all. To enter this decision, the 10th Circuit had to review a record prepared for a completely different purpose and assume that the findings necessary to support the application of the Declaratory Judgment Act were present (*i.e.*, that *Bob Jones* and its progeny did not apply). There was no effort made by the IRS nor the receiver to make such a record and none was made by the District Court *sua sponte* because the issue did not arise until the 10th Circuit entered its Opinion.

Sovereign immunity was the issue that was submitted to the 10th Circuit because it is dispositive of not only the declaratory judgment and injunction issued by the District Court, but it is also dispositive of the other issues that were embodied in the appeal.[3] For reasons unknown to the receiver, however, the 10th Circuit ignored that issue and ruled on the face of the Declaratory Judgment Act. This issue had not been fully briefed by the parties. The 10th Circuit

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[2] A proper treatment of this case does not leave the IRS unable to protect itself in these circumstances. In fact patterns like this, the IRS may simply serve the receiver with a levy and collect on the levy when the receivership estate is distributed. If the IRS then believes its ability to assess and collect are in jeopardy, it may file a claim under 26 U.S.C. § 6861. That, however, would also submit the IRS to the jurisdiction of the District Court, but that is as it should be.

[3] For example, one issue that has plagued the District Court Estate since the decision by the 10th Circuit is whether the IRS remains in the Receivership Action. The District Court has found that the IRS is a party, but the IRS has threatened to appeal any determination of the District Court that affects it on the grounds that it is not a party, despite its intervention.

Opinion nowhere discusses the nature of the waiver of sovereign immunity when the IRS intervenes in an *in rem* case.[4] Indeed, the 10th Circuit opinion never once even mentions in *in rem* nature of receiverships in general or this one in particular.

Te IRS's analysis of the waiver of sovereign immunity issue is simply wrong based on the holdings of this Court. *United States v. The Thekla*, 266 U.S. 328, 340-341 (1924) and *The Siren*, 74 U.S. (7 Wall) 152, 154 (1868). Each of these cases states that when the sovereign intervenes in an *in rem* action it waives sovereign immunity for all purposes regarding the *res*. This is still the law of the United States. The IRS has attempted to circumvent the law by purportedly intervening for a limited purpose in an *in rem* case, and the 10th Circuit opinion below is enabling that circumvention.

The IRS's brief mischaracterizes the holding in *Miller II* (*Miller v. Tony and Susan Alamo Foundation*, 134 F.3d 910, 916 (8th Cir. 1998). Both that case and the case it followed *Miller I* (*Miller v. Tony and Susan Alamo Foundation*, 975 F.2d 547 (8th Cir. 1992)), are *in personam* cases. *Miller I* involved the IRS's intervention in a case to claim proceeds of a sale of seized real and personal property by the United States Marshall to satisfy a judgment lien in favor of the Millers. *Miller II* involved the IRS's seizure of completely separate real property. In *Miller II*, the Millers attempted to challenge the seizure by the IRS of assets never subject to the jurisdiction of the District Court where they had obtained their judgment, arguing that the prior intervention by the IRS regarding the other property

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[4]It is common for appellate courts to rule on a dispositive jurisdictional issue and decline to reach a subordinate remedial issue. The receiver believes that this case may be the first wherein the appellate court ignored the dominant jurisdictional issue and instead ruled on a subordinate remedial issue. This may have been derived from the 10th Circuit erroneous holding that the Declaratory Judgment Act issue as jurisdictional. 245 F.3d at 1165. *See Schilling v. Rogers*, 363 U.S. 666 (1960) (holding that the Declaratory Judgment Act is merely remedial, not jurisdictional). This error infected the 10th Circuit opinion from beginning to end, and the need to correct it alone is reason to grant certiorari.

constituted a waiver of sovereign immunity as to the real property not before the District Court. The Millers then apparently cited to a string of interventions by sovereigns in *in rem* cases for the proposition that the IRS had waived sovereign immunity for all claims in the *in personam* District Court.

This is, of course, completely wrong, which is why it was delicately described by the 8th Circuit as a "seriously overbroad" reading of the law of waiver of sovereign immunity. *Cf.* IRS Response Brief at p. 9. That contention has nothing whatsoever to do with this case, where the IRS intervened in an *in rem* case but now purportedly is able to unilaterally identify "sub-*res*" groups of assets within the estate and thumb its nose at the court regarding any sub-*res* groups in which it does not currently claim an interest.[5] Under the well-established law, it could do this in an *in personam* case; it cannot do so in an *in rem* case. *The Thekla*; *The Siren*.

That the IRS continues to misread *Miller II* is perhaps best shown by the fact that in *Miller II* the 8th Circuit expressly stated that *The Siren* was still good law. If *Miller II* reads as the IRS now contends, then it is inconsistent with the very plain holding of *The Siren*, *i.e.*, that where the

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[5] The key to understanding this concept is founded in an understanding of why the IRS intervened without limitation, and could not and did not intervene for a limited purpose under 26 U.S.C. § 7424. The property that was the subject of the IRS's levy was Mr. Mandelman's claim in the receivership action, not the *res* of the Receivership Estate, itself. The levy alone protected this claim; by intervening, the IRS expanded its claim to the entire *res* of the Receivership Estate. By analogy, if the IRS were to have levied against Mr. Mandelman's stock in a corporation that owned a ship, and that ship was the subject matter of an admiralty action, the levy on the stock would not affect the admiralty action. If the IRS, however, were to take a further step and intervene in the admiralty action because it thought a creditor in that action might render its levy valueless, it is no longer merely protecting its interest in the stock, but participating directly in the *in rem* action concerning the ship. In this event, the IRS would not be allowed to intervene for a sub-*res* aspect of the ship. Simply stated, the "lien arising under this title [26]" was not "the property which is the subject of such action or suit." 26 U.S.C. § 7424.

sovereign intervenes in an *in rem* action it waives sovereign immunity for all matters related to that *res*.

At bottom, the IRS contends it gets to decide what the *res* of the receivership is. With all due respect, that is the job of the supervising court, not the IRS. By its repeated orders holding that by intervening the IRS had waived sovereign immunity, the District Court found that the *res* of the receivership was just that, and it could not be broken up into various sub-*res* groups by the IRS years after the fact of its intervention.[6]

If the case must be determined on the basis of the Declaratory Judgment Act, then this Court has authority to review the question of the *Bob Jones* exceptions, as the receiver did raise this before the 10th Circuit in its Petition for Rehearing, pp. 12-15.[7]

The *Bob Jones* issue was raised in the Petition for Rehearing because, as stated above, the issue that was submitted and all the briefing prior to the 10th Circuit opinion had been on the issue of sovereign immunity and intervention in an *in rem* case. The 10th Circuit's ruling based on the face of the Declaratory Judgments Act, however, brought into play for the first time *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-737 (1974) (recognizing two unwritten, judicially created exceptions to the prohibition on declaratory judgments

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[6]Contrary to the IRS's brief at p. 7, the receiver does seek certiorari on whether the District Court could order the IRS to do its job in a reasonable time regarding the tax returns of both IMMI and Motor. The IRS's attempt to read the receiver's petition as applying only to IMMI and not Motor is disingenuous, especially as the IRS noted at p. 5, n. 1 of its Response that in the petition the receiver used "receivership estate" to include both IMMI and Motor. The IRS is correct on page 7 of its Response when it states that the receiver does not seek certiorari regarding the tax returns of the three companies in Bankruptcy.

[7]The Court can hear a matter raised in a petition for rehearing. *Maryland v. United States*, 381 U.S. 41 (1965) (argument made for first time in petition for rehearing before Circuit Court of Appeals properly preserved for review); *cf. Wisconsin v. Federal Power Commission* 373 U.S. 294 (1963) (matter not raised below, even in petition for rehearing, would not be reviewed)

regarding federal taxes) and its progeny (*Elia v. Connet*, 908 F.2d 521, 523, 526 (9th Cir. 1990) (same); *In re State of Cal. v. Regan*, 641 F.2d 721, 722-23 (9th Cir. 1981) (same)).

There are two "*Bob Jones* exceptions" to the face of the Declaratory Judgment Act as set out by this Court: the first exists where the IRS could, under no circumstances, ultimately prevail (the prerequisites for equity jurisdiction having been met); and the second exists where the taxpayer has no other access to judicial review. The receiver fits within both exceptions.

As to the first, there has been no assessment (after almost two years) upon which the IRS could possibly prevail. This should come as no surprise as the putative taxpayer is a receiver. By definition, the receiver should have no profit that is not distributed as an expense and therefore there can be no taxes due.

As to the second, in a receivership there is truly the only one venue. A claim for taxes against the receivership estate is just that: a claim against the estate. Like any other claim, the receivership court has exclusive venue for claims against the estate. *Wabash Ry. Co. v. Adelbert College*, 114 U.S. 587 (1908).[8]

It is also significant to look at this Court's language which drove its holding in *Bob Jones*: "These allegations leave little doubt that a primary purpose of this lawsuit is to

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[8]Waiting until the IRS gets around to assessing on its own schedule could result in a perpetual receivership. Unlike the Bankruptcy Code, which under section 505(b) requires the IRS to assess within 6 months upon the request of a Trustee and thus a Trustee can have a tax return determined to be correct or not before the next year's tax return is due, a receiver can only accelerate the process to 18 months. 26 U.S.C. § 6501(d). Thus the IRS can thwart a receiver from ever closing down by not completing its review of any given year until after the next year's tax return is due. As a receiver could be personally liable for unpaid receivership taxes, 31 U.S.C. § 3713, no receiver would risk closing down a receivership until all tax issues were resolved. If the IRS did not intervene in a given receivership to claim taxes were due, however, § 3713 could not apply and thus a receivership could be shut down without risk to the receiver personally.

prevent the Service from assessing and collecting income taxes from petitioner." [*Bob Jones* at 2047]. Here, the exact opposite it true–the sole point of the motion was to get the IRS to assess so that the taxes could be paid (if any were due) and the estate wound up.

The face of the Declaratory Judgments Act does not tell the whole story, as this Court determined in *Bob Jones*. A simple examination of the legislative history of that Act shows it was never intended to prevent the receivership court from entering orders which are necessary to conclude a receivership. The termination of a receivership being supervised by a respected United States District Court Senior Judge should not depend upon an IRS bureaucrat deciding to finally get around to doing his job.[9]

In the short time since it was entered, the 10th Circuit opinion has already produced results that are both very bizarre (including the IRS denying that it is bound by the orders entered by the District Court after it intervened and the IRS taking the position that it may unilaterally dismiss itself from the case after achieving its desired results without risking adverse determination on issues it itself raised) and harmful (enabling the IRS to successfully challenge orders of the District Court in the Massachusetts Bankruptcy Court).

Certiorari should be granted so that it can be made clear that when the IRS intervenes in an *in rem* action it subjects itself to proper orders of the District Court, just as any other party does. *The Siren*; *The Thekla*; 28 U.S.C.

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[9]The IRS mentions in its Brief [footnote 2, bottom of page 7] that it has provided the receiver with a nearly completed draft examination report (i.e., a "draft assessment") dated September 9, 2001. The purpose for providing this information its brief is not stated, but it highlights the problem. The assessment has apparently been completed for at least four months by the time of this writing, but the IRS has yet to actually assess. This has never been a problem of making the IRS work faster than it can, but getting it to perform at all. It appears that the IRS's agenda is simply to make sure the United States District Court know that the IRS, not the District Court, controls the District Court's docket.

§ 7424.[10] The 10th circuit opinion incorrectly upsets the separation of powers balance by allowing the executive branch in intervene in an *in rem* action but then unilaterally delay and perhaps even defeat resolution of the proceeding for no reason other than a bureaucrat deciding a federal judge cannot order him to do his job.

Respectively submitted this 4th day of January, 2002.

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[10]28 U.S.C. § 7424 provides: "If the United States is not a party to a civil action or suit, the United States may intervene in such action or suit to assert any lien arising under this title on the property which is the subject of such action or suit. The provisions of section 2410 of title 28 of the United States Code (except subsection (b)) and of section 1444 of title 28 of the United States Code shall apply in any case in which the United States intervenes as if the United States had originally been named a defendant in such action or suit. In any case in which the application of the United States to intervene is denied, the adjudication in such civil action or suit shall have no effect upon such lien."